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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SAGINAW MINING COMPANY,
Petitioner,

v.

LEWIS GIBAS,
Claimant-Respondent,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

and

THE BENEFITS REVIEW BOARD,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

GERALD P. DUFF
(Counsel of Record)
HANLON, DUFF & PALEUDIS, Co., LPA
46770 National Road West
P. O. Box 77
St. Clairsville, Ohio 43950
Telephone: (614) 695-1444
Counsel for the Petitioner
Saginaw Mining Company

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THE QUESTIONS PRESENTED

I. May Federal Black Lung benefits be awarded on the theory that the employer failed to prove that the claimant was not disabled "in part" by pneumoconiosis, where the controlling statute provides for benefits only for "total disability due to pneumoconiosis"?

II. May Federal Black Lung benefits be awarded on the theory that the employer failed to prove that the claimant was not disabled in part by pneumoconiosis, in the face of uncontradicted evidence that the claimant was totally disabled as a result of illnesses wholly unrelated to pneumoconiosis?

PARTIES TO THE PROCEEDINGS

This case involves issues important to the adjudication of claims filed under the Federal Black Lung Acts. The Petitioner is the Saginaw Mining Company, P. O. Box 275, St. Clairsville, Ohio. It is a wholly owned subsidiary of the Oglebay Norton Company, 1100 Superior Avenue, Cleveland, Ohio. The Claimant-Respondent is Lewis Gibas, Route 1, St. Clairsville, Ohio, a former employee of Saginaw. The U.S. Department of Labor, Employment Standards Administration, Office of Workers' Compensation Programs, 200 Constitution Avenue, N.W. Washington, D.C., 20210 is a Respondent also. 20 C.F.R. § 802.411(b). The Benefits Review Board, U.S. Department of Labor, 1111 20th Street, N.W., Suite 757, Vanguard Building, Washington, D.C. 20036, is a Respondent in name only. Rule 15(a), F.R. App. P.

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No. 84-

SAGINAW MINING COMPANY,
Petitioner,

v.

LEWIS GIBAS,
Claimant-Respondent,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

and

THE BENEFITS REVIEW BOARD,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Saginaw Mining Company respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 26, 1984.

OPINIONS BELOW

Under the federal statutes and regulations, "Black Lung" claims are first heard by an Administrative Law Judge (ALJ) of the Department of Labor. An "on the record" appeal lies to the Benefits Review Board (the

Board), and then to the United States Court of Appeals. 33 U.S.C. §§ 921(b) and (c).

The opinion of the ALJ in this case is not reported. A copy is in the Appendix hereto (hereinafter referred to as "App. ——") at 31a-37a. The Board's opinion is reported at 6 Black Lung Reporter (BLR) 1-18 (1983). A copy of it is at App. 19a-30a. The Court of Appeals decision is reported at 748 F.2d 1112 (Nov. 26, 1984). A copy of the decision appears at App. 1a-16a. The judgment is at App. 17a-18a.

GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the United States Court of Appeals was entered on November 26, 1984. This Petition for Certiorari is being filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1), 28 U.S.C. § 2101(c) and 33 U.S.C. § 921(c).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following statutory and regulatory provisions are set forth in the Appendix:

1. The Federal Coal Mine Health & Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972, §§ 401 and 402, 30 U.S.C. §§ 901, 902. App. 38a-41a.

2. Federal Mine Safety & Health Act of 1977 (Black Lung Benefits Act) §§ 402 and 411(c)(5), 30 U.S.C. §§ 902, 921(c)(5). App. 42a to 44a.

3. 20 C.F.R. §§ 410.412, 410.426, 727.203. (App. 45a-51a)

STATEMENT OF THE CASE

Lewis Gibas is a former employee of petitioner Saginaw Mining Company. He worked for Petitioner until he suffered a heart attack in 1975. After his heart attack in

1975, all the activity he had been accustomed to doing was stopped. After his heart attack, he was off work for a year, tried to start working again and then was hospitalized for his heart problems. He was hospitalized for his heart conditions 12 times between 1975 and 1978. No mention was ever made of pneumoconiosis in these hospitalizations.

Mr. Gibas then filed an application for benefits under the Federal Coal Mine Health & Safety Act of 1969, 30 U.S.C. § 901, *et seq.*, as amended. Mr. Gibas stated in his application for benefits that he quit work because of his heart attack which had disabled him. Mr. Gibas later admitted that he obtained Social Security Disability Benefits for his heart problems. Mr. Gibas also received sickness and accident benefits due to his heart attack. He also had an arthritic condition in his knee.

A hearing was held on October 28, 1980, by the ALJ. The only medical evidence in this case was as follows. There was one positive x-ray showing the most minimal stage of pneumoconiosis recognized by the regulations. 20 C.F.R. § 410.428. Four other x-ray opinions were negative for pneumoconiosis. The remainder of the evidence was uncontroverted. It is conceded, and the ALJ found, that there was "no medical opinion evidence" showing that Mr. Gibas was totally disabled due to pneumoconiosis. (App. 34a) There was undisputed evidence of the existence of congestive heart failure, high blood pressure and arthritis. The Claimant's own doctor reported the existence of coronary artery disease with an inferior myocardial infarction and three vessel disease found at the Cleveland Clinic, for which no surgery is possible.

A pulmonary specialist testified to a reasonable degree of medical certainty that Mr. Gibas was not totally disabled due to pneumoconiosis or any respiratory or pulmonary impairment. He testified to a reasonable degree of medical certainty that any total disability this man might

have did not arise in whole or in part out of his coal mine employment. He testified that on the basis of the man's respiratory condition, the man would be able to do his usual work or comparable and gainful work. This is corroborated by the medical report of the Department of Labor's doctor, who stated that the claimant would be capable of doing his normal work in the mines.

Nevertheless, the ALJ found the Claimant entitled to benefits in an opinion and order issued on or about February 6, 1981. To reach this conclusion he invoked a presumption of total disability set forth in 20 C.F.R. § 727.203(a)(1).

Upon the appeal to the Benefits Review Board, the Board reversed. The Board held that the presumption relied upon by the ALJ was inconsistent with the statute. Following its prior decision in *Jones* v. *The New River Co.*, 3 Black Lung Reporter 1-199 (1981), the Board held that the language of the regulation relied upon below would allow the granting of claims where only part of the disability was due to pneumoconiosis; and that such was contrary to the statutory requirement that benefits only be granted in a case of total disability resulting from pneumoconiosis.

The Court of Appeals reversed, holding that while the Board had the authority to find the regulatory presumption contrary to the statute, it erred in finding that the "in whole or in part" language of 20 C.F.R. § 727.203 (b)(3) was in fact inconsistent with the statute. The Court further held that the operator had the burden of disproving that the claimant was totally disabled due to pneumoconiosis and had not carried that burden.

A. The Statute

Section 401 of Title IV of the Federal Coal Mine Health & Safety Act of 1969 states that the Act's purpose was to provide benefits to living miners who are ". . . totally

disabled due to pneumoconiosis" and to the survivors of miners ". . . whose deaths were due to . . . [pneumoconiosis] or who were totally disabled . . . [by it] at the time of their deaths." 30 U.S.C. § 901. The Secretary of H.E.W. was granted authority to define "total disability" in accordance with the Act, and that such regulations were to provide that a miner shall be considered totally disabled when his pneumoconiosis prevents him from engaging in gainful employment comparable to his mine employment. 30 U.S.C. § 902(f). No authority was given in the Act to provide benefits to miners only "partially" disabled by pneumoconiosis.

Similar "total disability" requirements were set forth in the 1977 amendments to § 402(f). The Secretary of Labor's regulations were to continue to require that a miner be considered totally disabled when his pneumoconiosis prevents him or her from engaging in gainful employment requiring skills and abilities comparable to the miner's mine employment. 30 U.S.C. § 902(f)(1)(A). Although the 1977 Act relaxed the medical standards, 30 U.S.C. § 902(f), no authority was given to promulgate regulations, as to live miners, which would allow benefits for only partial disability due to pneumoconiosis.

B. The Regulations

The Secretary of H.E.W. promulgated 20 C.F.R. § 410.412 early in the program. True to the statute, it tracked the statutory requirement of total disability. The Department of Labor, however, in August of 1978 at 43 Fed. Reg. 36825 promulgated 20 C.F.R. § 727.203 which creates an interim presumption of total disability. Once a claimant establishes a presumptive case, in one of the four ways set forth in § 727.203(a), the operator may rebut the presumption of total disability under the language of 20 C.F.R. § 727.203(b)(3) *only* if it can show that the total disability did not arise in whole *or in part* out of coal mine employment.

C. The ALJ's and the Board's Decisions

As shown previously, the ALJ invoked the presumption of total disability set forth in 20 C.F.R. § 727.203(a)(1) on the basis of one x-ray showing the most minimal accepted category of pneumoconiosis. The ALJ acknowledged that:

> ". . . there is no medical opinion evidence to the effect that the claimant is totally disabled due to pneumoconiosis." (App. 34a)

The ALJ also said:

> "It is recognized that the claimant has serious cardiovascular problems, that these problems led to his retirement in June, 1978 and contribute to his present shortness of breath and that apparently his pneumoconiosis by itself, did not prevent him from working in June, 1978 or earlier." (App. 35a-36a)

The ALJ then rejected the uncontradicted medical evidence showing that the man's disability was due to his heart problems, and not from his pneumoconiosis as being "unduly speculative." (App. 36a) He refused to find the presumption rebutted.

The Board reversed the ALJ and directed that the claim be denied. The Board found that the ALJ incorrectly interpreted § 727.203(b)(3) as to the "in part" language in view of its earlier cases. The Board stated that, "Thus, a showing that the miner's disability is totally due to heart disease has been held sufficient to support subsection (b)(3) rebuttal." App. 23a. The Board also found that the ALJ erred in rejecting the medical testimony that the claimant's disability was due to heart disease as being "unduly speculative." The Board found that the documentation supported such conclusion and that the ". . . record reveals there is no medical opinion contradicting Dr. Kress' conclusion", which so stated. The Board thereby found the presumption to be rebutted as a matter of law. (App. 23a)

D. The Court of Appeals' Decision

The Court of Appeals devoted the majority of its decision in deciding whether the Board possessed sufficient adjudicatory authority to declare the regulation invalid as being inconsistent with the Act. After it ruled that the Board had such authority,[1] it went on to uphold the Secretary's presumption in the face of the Board's decision. It then went on to hold, in light of the presumption, that Saginaw failed in its ". . . burden of proving that Gibas was not totally disabled." (App. 16a)

REASONS FOR GRANTING THE WRIT

I. THE BENEFITS REVIEW BOARD CORRECTLY HELD THAT 20 C.F.R. § 727.203(b)(3), IN ALLOWING RECOVERY OF BENEFITS FOR PARTIAL DISABILITY DUE TO PNEUMOCONIOSIS, IS CONTRARY TO THE CONTROLLING STATUTE. THIS IS A MOST IMPORTANT QUESTION OF FEDERAL BLACK LUNG LAW.

The Black Lung Acts require the payment of benefits to miners who are totally disabled because of pneumoconiosis where that pneumoconiosis arose from his employment in the mines. 30 U.S.C. §§ 901 and 902. Under the Secretary of Labor's regulations, after the employee produces certain evidence of pneumoconiosis, he is presumed to be totally disabled and the burden then shifts to the employer to establish that "the total disability did not arise in whole or in part out of coal mine employment." 20 C.F.R. § 727.203(b)(3).

As construed by the Court below, this presumption can only be overcome if the employer is able to prove that pneumoconiosis played no part in causing a miner's disability. In requiring the employer to prove that no part

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[1] The Court correctly relied upon such cases as *Crowell* v. *Benson*, 285 U.S. 22, 76 L. Ed. 598 (1932) in coming to this conclusion, it is respectfully submitted.

of a miner's claimed condition is attributable to pneumoconiosis, the Court's opinion and the regulation would allow recovery of benefits even though, as here, the uncontroverted evidence demonstrates that the claimant was in fact totally disabled as a result of other ailments—from arthritis to recurrent congestive heart failure, hypertension, and coronary artery insufficiency—having nothing to do with pneumoconiosis or employment in the mines. As applied by the Court of Appeals, the regulatory presumption conflicts with the statutory requirement that a claimant may only recover if he is "totally disabled due to pneumoconiosis." [2]

"Black lung" claims are adjudicated under procedures established in Title IV of the Federal Coal Mine Health and Safety Act of 1969 and the amendments thereto. 30 U.S.C. § 901 *et seq.* The Act was and is designed to provide benefits for miners who were "totally disabled due to pneumoconiosis." 30 U.S.C. § 901. The original legislation gave authority to the Secretary of HEW to promulgate regulations. 30 U.S.C. §§ 902(f) and 932(h) (1976). The early regulations required the miner to be totally disabled to be entitled to benefits. 20 C.F.R. § 410.412.

In 1977, the current § 402(f) of the Act, 30 U.S.C. § 902(f), was adopted. It gave the Secretary of Labor the authority to define "total disability" and to promulgate regulations for processing claims under Part C. As with the earlier version of the law, nowhere in § 902(f) is there authority to provide benefits to miners "partially" disabled by pneumoconiosis. Indeed, the Depart-

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[2] This Court has not been reluctant to examine regulatory presumptions when important questions are present, as here, such as whether the regulation is contrary to the enabling statutes. *See, U.S. Industries/Federal Sheet Metal, Inc., et al.* v. *Office of Workers Compensation Programs, United States Department of Labor, et al.*, 455 U.S. 608, 71 L. 2d 2d 495 (1982).

ment of labor was only authorized to establish criteria for appropriate medical tests which "accurately reflect *total disability.*" *Id.* § 902(f)(1)(D). (Emphasis added)

Numerous presumptions are available to a claimant, in both the statutes and the regulations, to assist him in establishing his claim. The so called "Interim Presumptions" in the regulations promulgated on August 18, 1978 set forth various minimal standards to trigger a presumption of total disability due to pneumoconiosis. These appear in 20 C.F.R. Part 727. Section 727.203(a) creates some of these presumptions. A claimant can invoke a rebuttable presumption of total disability due to pneumoconiosis by a positive x-ray [§ .203(a)(1)]; by ventilatory tests [§ .203(a)(2)] or arterial blood gas tests [§ .203(a)(3)], meeting certain values; or by a medical report stating the presence of total disability due to pneumoconiosis [§ .203,(a)(4)]. Since thousands of cases remain to be resolved under the interim presumptions in § 727.203, the important questions presented herein are not at all moot but are of continued concern and need to be finally resolved by this Court.

Under 20 C.F.R. § 727.203(b), the operator may rebut the presumption after it has been invoked in a very limited number of ways. It may do so by showing the miner is in fact doing his usual coal mine work or comparable work [§ .203(b)(1)]; by evidence that he is able to do his usual coal mine work or comparable work [§ .203 (b)(2)]; by evidence that the total disability did not arise in whole or in part out of coal mine employment [§ .203(b)(3)]; or that the miner does not have pneumoconiosis [§ .203(b)(4)]. Rebuttal under (b)(1), where the man is still working, is very rare indeed. It is difficult to show rebuttal under (b)(4) when, as here, there is an x-ray showing pneumoconiosis present. The operator as a practical matter is left with arguing (b)(2) and (b)(3) in the vast majority of cases. In this case, the Board did not even address operator's (b)(2) argument,

and so the operator here was limited entirely to consideration of its (b)(3) rebuttal argument.

The effect of the regulation relied upon by the ALJ in this case, 20 C.F.R. § 727.203(b)(3), is to expand the scope of the enabling Act. In promulgating § 727.203 (b)(3), the Secretary of Labor was acting outside his authority which is derived from, and governed by, the terms of the statute. *See, e.g., Peters* v. *Hobby*, 349 U.S. 331, 99 L. Ed. 1129 (1955). In *Stark* v. *Wickard*, 321 U.S. 288, 88 L. Ed. 733 (1944), Justice Reed in the majority opinion stated, "[w]hen Congress passes an Act empowering the administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted." 321 U.S. at 309, 88 L. Ed. at 748 (1944).

Under the "in part" language of 20 C.F.R. § 727.203 (b)(3), a miner would be entitled to benefits if his pneumoconiosis contributed even a mere 1% to his total disability. This is clearly not in keeping with the expressed intent of Congress in passing legislation to provide benefits to miners "totally disabled because of pneumoconiosis." [3]

Pneumoconiosis, by definition, is "a chronic dust disease of the lung . . . arising out of coal mine employment." 30 U.S.C. § 902(b). Under the Act, a miner will receive benefits when his pneumoconiosis arising out of

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[3] A search of the 1977 legislative history fails to reveal any further Congressional direction in this regard. To the contrary, the floor statements by Senator Javits, a supporter of the Act, were as follows:

> I wish to assure my colleagues that although the bill incorporates a number of liberalized standards governing the adjudication of black lung claims, it clearly preserves its basic integrity as a workers' compensation program by requiring a finding not only of the presence of black lung disease, *but also that the claimant's disability due to the disease prevents him from performing coal mine work.* [Cong. Rec. S14416 (daily ed., February 7, 1978)] [Emphasis supplied].

coal mine employment is "totally disabling." *Id.* Section 727.203(b)(3) as written, however, permits compensation if only *part* of the disability arose out of coal mine employment, *i.e.*, only *part* of the disability need be due to pneumoconiosis. This would permit awards of benefits to claimants *not* totally disabled by pneumoconiosis in and of itself. Besides being inconsistent with the Act, this regulation places upon the employer an almost impossible standard of rebuttal in most cases, where pneumoconiosis (however minimal) is diagnosed. Under § 727.203(b)(3), as written, the employer must show that *no part* of the total disability arose out of coal mine employment.

The Secretary's regulation, ". . . will be sustained [as valid] as long as it is 'reasonably related to the purpose of the enabling legislation' . . . ". *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369, 36 L. Ed. 2d 318, 330 (1973), quoting *Thorpe* v. *Housing Authority of Durnham*, 393 U.S. 268, 280-81, 21 L. Ed. 2d 474 (1969). A regulation must be consistent with the statute under which it is promulgated and if the regulations are unreasonable or contrary to the provisions of the enabling statute, they are invalid. See *U.S. Pipe & Foundry Co.* v. *Webb*, 595 F. 2d 264 (5th Cir., 1979); *United States* v. *Larionoff*, 431 U.S. 864, 53 L. Ed. 2d 48 (1977); *Marshall* v. *Gibson's Products, Inc.*, 584 F. 2d 668 (5th Cir. 1978); *U.S. ex rel. Mississippi Road Supply Co.* v. *H.R. Morgan, Inc.*, 542 F. 2d 262 (5th Cir. 1976), *cert. denied*, 434 U.S. 828, 54 L. Ed. 2d 86 (1977); see also *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 36 L. Ed. 2d 318 (1973). If the ALJ can reject uncontradicted medical opinions without reason as being "unduly speculative" the § 727.203(a) presumptions, in fact, become irrebuttable. Since Congress has clearly chosen not to make the interim presumption irrebuttable, as demonstrated by the existence of 30 U.S.C. § 921(c) and by the legislative history of the Reform

Act, the Secretary has to promulgate regulations which reasonably allow rebuttal as intended by Congress. The "in part" language of 20 C.F.R. § 727.203(b)(3) should not be sustained as valid.

The Board has agreed with this reasoning in the *Jones/Gibas* line of decisions where it stated that the statute only allows claims to be granted where the miner is totally disabled due to pneumoconiosis and that the language of the regulation permits claims to be granted where the miner has only partial disability due to pneumoconiosis. The *Jones* opinion sets forth the Board's rationale in detail:

> "Section 727.203(b)(3) as written, however, permits the presumption to stand if only *part* of the disability arose out of coal mine employment, *i.e.*, only *part* of the disability need be due to pneumoconiosis. This would permit awards of benefits to claimants not *totally* disabled by pneumoconiosis in and of itself. Besides being inconsistent with the Act, this regulations's phraseology places upon employer a nearly impossible burden of proof in cases, such as the instant one, where pneumoconiosis is diagnosed. Under Section 727.203(b)(3), as written, the employer must show that *no part* of the total disability arose out of coal mine employment." (Emphasis in original) (App. 74a)

The Court of Appeals tries to save the regulation by saying that the "in part" language refers to causation, not total disability. It is impossible to see how this tautology saves the regulation. If only part of the disability arises from pneumoconiosis (even if all causes considered together, the claimant is totally disabled), clearly the pneumoconiosis is only a partially causative factor. Either way, coal mine exposure has only caused a part of the inability to work.

Accordingly, if a claimant could invoke the interim presumption on any basis, the only means of rebuttal

under 20 C.F.R. § 727.203(b)(3) would be to show that tne miner was not totally disabled due to a respiratory or pulmonary impairment or that the impairment did not arise to *any* degree, however insignificant, out of coal mine employment. There are many respiratory and pulmonary diseases which have nothing to do with coal dust and stir no controversy on the point. Some may be caused by genetic deficiencies, or bacteria, or cigarette abuse, or metastatic cancer not primary in the lung, or trauma, or obesity, or allergies, or asthma, or some other non-employment related source. The result of the regulation, therefore, is the compensation of all disabling lung disease in coal miners regardless of etiology. This approach was never intended by the Congress and is not reflected in the Act. There is nothing in the Act or its Amendments which detracts from the underlying principle that only totally disabling pneumoconiosis is compensable in the case of a living miner.

The only reference to partial disability in the scheme of the Act is in 30 U.S.C. § 921(c)(5) of the 1977 Amendments. (App. 44a) It concerned certain deceased miners, dying on or before March 1, 1978, who were employed for 25 years in the mines before June 30, 1971. This very limited provision was, in effect, removed by the 1981 Amendments, which indicated that the provision should not apply with respect to claims filed on or after 180 days after the effective date of the Black Lung Benefits Amendments of 1981. Since Congress confined partial disability awards to this specific category of death claims, it is clear that this is as far as it extended "partial disability" awards. Thus, the "in part" language of 20 C.F.R. § 727.203(b)(3) does not comply with the Black Lung Act and is invalid.

Although the Third and Fourth Circuits have similarly interpreted (b)(3), *Carozza* v. *U.S. Steel Corp.*, 727 F. 2d 74 (3rd Cir. 1984), and *Bethlehem Mines Corp.* v. *Massey*, 736 F. 2d 120, 123 (4th Cir. 1984), and there is similar *dicta* in *Alabama By-Products* v. *Killingsworth*,

733 F. 2d 1511, 1516 N. 10 (11th Cir. 1984), to allow the Court of Appeals decision to stand would be to in effect sanction partial disability awards in federal black lung claims. This is so in spite of the fact that the statutes only provide for the awarding of benefits to a living miner who is *totally disabled* due to pneumoconiosis. 30 U.S.C. §§ 901 and 902. There is no question that the Court of Appeals so ruled since at page 4 of its decision, App. 4, it specifically cites the ALJ's finding that:

> "I conclude that the evidence fails to show that the claimant's present disability . . . does not arise at least in part from his pneumoconiosis."

To allow the Court of Appeals decision to stand would be to place an impossible burden upon the coal mine operators to rebut a presumption of total disability once it is invoked. In many, if not all, cases it would be impossible to prove that the miner's total disability did not arise in some small part out of his coal mine employment. To place such burden on the operators would be to run contrary to the expressed intent of Congress in enacting the statutes applicable herein. It is submitted that in this respect the Board's decision that the "in part" language in the regulation was contrary to the statute is correct.

II. THE BOARD FOLLOWED ITS STATUTORY SCOPE OF REVIEW HEREIN AND RULED THAT THE UNDISPUTED EVIDENCE PROVED REBUTTAL OF THE PRESUMPTION OF TOTAL DISABILITY. THERE WAS NO SUBSTANTIAL EVIDENCE OF RECORD TO SUPPORT THE AWARD OF BLACK LUNG BENEFITS TO CLAIMANT LEWIS GIBAS. THESE QUESTIONS INVOLVE THE COURT'S LIMITED SCOPE OF REVIEW.

The Board examined all of the evidence in the record. Far from overstepping its statutory scope of review, it meticulously examined all of the evidence in the record to

see if the ALJ's decision was supported by substantial evidence. It acknowledged its limited scope of review. (App. 21a)

Similarly, the Court's scope of review on these cases is limited. The Court of Appeals may modify or set aside a decision of the BRB only if it is determined that the Board committed an error of law, or the pertinent findings are unsupported by substantial evidence. 33 U.S.C. § 921(c). *See, e.g., O'Keefe* v. *Smith, etc.*, 380 U.S. 359 (1965); *Peabody Coal Co.* v. *Director*, 581 F. 2d 121 (7th Cir. 1978); *United States Steel Corporation* v. *Gray*, 588 F. 2d 1022 (5th Cir. 1979).

Here, the Board correctly held that the uncontradicted medical evidence of record showed that the presumption of total disability invoked by the ALJ was rebutted as a matter of law. The Board properly held that the ALJ arbitrarily refused to consider uncontradicted expert medical opinion evidence that the man's total disability, if any, was due to his unrelated heart problems and not pneumoconiosis. The Board's ruling is supported by substantial evidence of record in this respect and should have been affirmed.

The Board accepted the ALJ's determination that the one x-ray showing the most minimal category acceptable as pneumoconiosis should be accepted. This finding is not disputed herein by Petitioner. By virtue of this, the ALJ had invoked the presumption of total disability set forth in 20 C.F.R. § 727.203(a)(1).[4] The Board, how-

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[4] The ALJ properly ruled that the only presumption that the claimant could be entitled to was under (a)(1). He specifically weighed the evidence and found that the claimant was not entitled to the invocation of the presumption under § 727.203(a)(2) because the valid pulmonary function tests did not meet the disability levels set in the regulations. Tests which demonstrate less than full effort aren't valid since this is an effort dependent test. Also, none of the arterial blood gas tests met the disability levels to invoke § 727.203(a)(3). No medical report pursuant to § 727.203(a)(4) was introduced.

ever, went on to rule that the ALJ improperly failed to consider all the relevant medical evidence in the case. It was clear error for the ALJ to have done so, and the Board ruled correctly on this point.

20 C.F.R. § 727.203(b) requires that in adjudicating a claim under this subpart, ". . . *all* relevant medical evidence *shall be considered.*" This is basic, of course, and is the law whether the claim is to be decided under the interim presumptions or under the prior regulations. The ALJ, however, rejected expert opinions, *admittedly in the absence of contrary medical opinion*, under the theory that:

> "I believe that it would be unduly speculative to attribute all of his disability to his cardiovascular impairment and none to his pneumoconiosis, and I decline to do so." (Decision pg. 4, § 2). (App. 36a)

There is no evidence in the record to support this finding. It is the ALJ who is speculating, not the doctor. The uncontroverted proof submitted by the Petitioner was that the man could do his usual work but for his cardiovascular problems, which are unrelated to pneumoconiosis. Any total disability he may have, if any at all, did not arise in whole or part from his coal mine employment. There is no evidence, therefore, of record to support the findings of the Judge, nor to support his rejection of this clearly correct rebuttal evidence.

While the adjudication officer is not bound to accept the theory of any one medical expert witness, he is bound to take a qualified medical opinion into account and, absent medical opinion evidence to the contrary, he cannot simply disregard a qualified physician's medical opinion. *Peabody Coal Co.* v. *Director*, 581 F. 2d 121, 124 (7th Cir. 1978). If a physician's report is to be rejected, the adjudicating officer must provide an adequate rationale supporting the decision. *Schaaf* v. *Matthews*, 574 F. 2d 157 (3rd Cir. 1978). The Board properly

found that no valid reason was given by the ALJ for all of the evidence he rejected in this case. The law could not be more clear on this point. As the Third Circuit said in *Gober* v. *Matthews*, 574 F. 2d 772, 777 (3rd Cir. 1978):

> We are left with the impression that the testimony of Dr. Dzurek was rejected because it presented an "exaggeration" only as compared with the administrative law judge's own conclusions.
>
> Such an evaluation would be improper. *While an administrative law judge is free to resolve issues of credibility as to lay testimony or to choose between properly submitted medical opinions, he is not free to set his own expertise against that of a physician who testified before him.* In this respect, we note the following observation by the Supreme Court.
>
> 'The decision whether to continue disability benefits will turn, in most cases, upon "routine, standard, and unbiased medical reports by physician specialists," *Richardson* v. *Perales*, 402 U.S. [389] 404, [91 St. Ct. 1420, at 1428, 23 L. Ed. 2d 842], concerning a subject whom they have personally examined. In *Richardson* the Court . . . emphasiz[ed] that while there may be "professional disagreement with the medical conclusions," the "specter of questionable credibility and veracity is not present."'
>
> After discounting Dr. Dzurek's testimony, the administrative law judge commented that Gober's lung disfunction was "based in part upon emphysema," and "may or may not be due to the fact that he smoked one pack of cigarettes daily for forty years." *It is of questionable propriety in any event for the administrative law judge to speculate on the source of lung disability when no medical evidence was submitted to support such hypothesis.* (emphasis added) (footnotes omitted)

Such words could hardly be more germane than to what the Judge did in this case. He had *no acceptable*

medical evidence before him to cause him to fail to credit the specialists' testimony. See also, *Peabody Coal Co.* v. *Director*, 581 F. 2d 121, 124 (7th Cir. 1978); *Schaaf* v. *Matthews*, 574 F. 2d 157, at 159 (3d Cir. 1978); *Kelly* v. *Railroad Retirement Bd.*, 625 F. 2d 486 (3rd Cir. 1980); *Cotter* v. *Harris*, 642 F. 2d 700, 706 (3rd Cir. 1981); and *King* v. *Califano*, 615 F. 2d 1018 (4th Cir., 1980).

The ALJ, without any medical specialist's opinion evidence in this file to contradict the same, rejected the qualified specialists' opinions on record. He is absolutely not allowed to do this as a matter of law. While there can be no doubt he can choose one conflicting qualified medical opinion over another, he cannot reject properly given medical specialists' opinions in the absence of such contravailing expert opinion evidence.

Under 20 C.F.R. § 727.4(b) the sections of subpart D, Part 410 which are not inconsistent with the new Act, apply to Part 727 claims. They are appropriate to consider, in determining meaning and extent of the Act as to "total disability" due to pneumoconiosis. Under § 410.422 (c), whether or not pneumoconiosis in a particular case renders a miner totally disabled is determined from all of the facts of the case, however, "primary consideration is given to the medical severity of the individual's pneumoconiosis." § 410.426(a).

Section 410.426(a) very clearly provides that:

> "A miner shall be determined to be under a disability *only* if his pneumoconiosis is (or was) the primary reason for his inability to engage in such comparable and gainful work. Medical impairments *other* than pneumoconiosis may not be considered." (Emphasis added)

As the Courts have clearly held, pneumoconiosis or a chronic respiratory or pulmonary impairment must be shown by a claimant to be the primary cause of his disability. *Gastineau* v. *Mathews*, 577 F. 2d 356, 358 (6th

Cir. 1978); *Ansel* v. *Weinberger*, 529 F. 2d 304, 308-09 (6th Cir. 1976); *Hill* v. *Califano*, 592 F. 2d 341, 346 (6th Cir., 1979); *Back* v. *Califano*, 593 F. 2d 758 (6th Cir. 1979). Claimant has the burden of proving this. *Gastineau* v. *Mathews*, *supra*, at 359; *Prokes* v. *Mathews*, 559 F. 2d 1057, 1060 (6th Cir. 1977). Impairments other than pneumoconiosis cannot be considered.

Since the primary consideration is given to the medical severity of the individual's pneumoconiosis, it is clear from the medical evidence of record, that the Claimant had the most minimal pneumoconiosis acceptable as such by the regulations. The generally accepted medical position is that simple pneumoconiosis is not total disabling *per se*. As this Court so appropriately recognized in *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 7, 49 L. Ed. 752, 761 (1976):

> "Simple pneumoconiosis, ordinarily identified by x-ray opacities of a limited extent, is generally regarded by physicians *as seldom productive of significant ventilatory impairment.* Complicated pneumoconiosis generally far more serious, involves progressive massive fibrosis, as a complex reaction to dust . . . and usually produces significant pulmonary impairment . . ." (Emphasis added)

While x-rays can invoke the presumption, medically, of course, they only establish the presence or absence of the disease, not the disability (if any) therefrom. As the Board has succinctly stated:

> "It is well settled that x-rays are not diagnostic of the extent of a respiratory disability, but only of the presence or absence of disease." *Arnoni* v. *Director*, 6 BLR 1-423 at 425 (1983).

The medical evidence of record is clear that the Claimant, if disabled at all, is disabled because of unrelated heart problems, and not due to his minimal pneumoconiosis. All of the medical opinions stated that he was not disabled due to pneumoconiosis. The Claimant has not

proven that he is totally disabled primarily because of pneumoconiosis, excluding the other conditions which may not be considered in determining total disability, and the Board correctly found that the substantial evidence of record showed that the presumption had been rebutted as a matter of law under § 727.203(b)(3).

The Board indicated that it need not reach the question of rebuttal under § 203(b)(2), but the foregoing evidence which is uncontradicted clearly shows that rebuttal, as a matter of law, would apply under this section also.

All of the evidence, therefore, has rebutted the presumption. The Court of Appeals erred in not so finding and affirming. To allow the Court of Appeals decision to stand would be to violate the provisions of the Act, the regulations and the applicable case law. The Court of Appeals decision runs counter to this Court's *Usery* opinion. It sets an improper standard for other cases to be adjudicated under. It is important that the writ issue to set the law straight.

III. THE COURT OF APPEALS ERRONEOUSLY SHIFTED THE BURDEN OF PROOF. THE COURT OF APPEALS IMPROPERLY SHIFTED THE BURDEN OF GOING FORWARD WITH THE EVIDENCE AND THE ULTIMATE BURDEN OF PROOF:

A) The Employer Does Not Have "The Burden of Proving That Mr. Gibas Was Not Totally Disabled;" and

B) The Employer Successfully Rebutted the Presumption of Total Disability in 20 C.F.R. § 727.203(a)(1).

THESE ISSUES ARE OF GREAT IMPORTANCE IN THE ADJUDICATION OF BLACK LUNG CLAIMS AND WILL AFFECT THE RESOLUTION OF MANY, IF NOT ALL, CLAIMS.

As this Court has stated, the effect of a presumption in these and other cases is simply "to shift the burden of going forward with evidence from the claimant to the operator. See Fed. Rule Evid. 301." *Usery* v. *Turner-*

Elkhorn Mining Company, 428 U.S. 1, 27, 49 L. Ed. 752, 773 (1976). In *Usery* this Court indicated that Rule 301 of the Federal Rules of Evidence, applies to Federal Black Lung claims, and its language is as follows:

> "In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast."

It is clear, therefore, that the presumption does not constitute evidence and does not shift the burden of persuasion from the claimant to the operator. The presumption merely shifts the burden of going forward. Once probative evidence is introduced on the issue of total disability or the cause of total disability, the presumption no longer carries the claimant's case. The burden of going forward having been shifted to the operator, and by the overwhelming evidence introduced, it has sustained its burden of going forward on these issues. The claimant then must carry his ultimate burden of proof, that is, the burden of persuasion which does not shift. *Prokes* v. *Matthews*, 559 F. 2d 1057, 1060 (6th Cir. 1977). He has clearly failed in his burden in this case.

The Court of Appeals, it is respectfully submitted, failed to apply the appropriate standard for rebuttal of the presumption. The Court of Appeals erroneously held that once the presumption of total disability was invoked by Claimant's evidence, "Saginaw had the burden of proving that Gibas was not totally disabled." It is respectfully submitted that this flies in the face of established Evidence Rules and the decisions of this Court. As this Court quite clearly held in *Usery* v. *Turner-Elkhorn Mining Company*, the effect of a presumption is simply to shift the burden of going forward with the evidence from

the claimant to the operator, and the ultimate burden of proof remains on the party whom it was originally cast—in this case the claimant. In *Usery* this Court specifically referred to Rule 301 of the Federal Rules of Evidence as being applicable. See *Usery* v. *Turner-Elkhorn Mining Company*, 428 U.S. 1, 27, 49 L. Ed. 752, 773 (1976).

The Court of Appeals decision simply does not recognize the sequence of evidentiary consideration that must be engaged in by the Administrative Law Judge. If claimant successfully invokes the total disability presumption in § 727.203(a) by his evidence, the question then becomes whether the operator's evidence is sufficient to rebut the presumption. The ultimate burden of proof never changes. Should the operator's evidence be sufficient to rebut the presumption, which is submitted that it was in uncontradicted fashion in this case, then the burden remained upon the claimant to prove he was totally disabled due to pneumoconiosis. The Court of Appeals decision shifted the burden of ultimate proof, which is certainly contrary to all rules of law, the regulations, the evidentiary rules, and this Court's clear expression in the *Usery* case as set forth hereinabove.

This sequence of evidentiary consideration, of course, is extremely important in the processing of these cases. This case was decided under the Interim presumptions in Part 727 of 20 C.F.R., which are liberal in a claimant's behalf as to invoking of the presumption of total disability. It would be absolutely contrary to the statute and regulations to hold that the ultimate burden of proof also shifted to the operator when this is not what the statutes nor the regulations provided and especially under the interim presumption cases where the threshold of presumptive invocation is so low. These types of issues obviously arise in many, if not most, "Black Lung" cases. Thousands upon thousands of these cases have yet to be decided. Attached in the Appendix, at 52a-58a, is a copy of the Black Lung Reporter index of Board decisions dealing

with § 727.203(a) presumption invocation and § 727.203 (b) rebuttal. It can be seen there are many reported cases thereon.

It is submitted that the Court of Appeals in ruling on the important questions herein departed from the accepted and usual course of judicial proceedings, and in conflict with this Court's decision in *Usery*, so as to call for an exercise of this Court's power of supervision. This Court has not examined such issues since *Usery*. It is submitted that the issues herein are important questions of federal law which should be settled by this Court. This Court, it is respectfully urged, should hear and rule upon these important points.

CONCLUSION

For the foregoing special and important reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

GERALD P. DUFF
(Counsel of Record)
HANLON, DUFF & PALEUDIS, Co., LPA
46770 National Road West
P. O. Box 77
St. Clairsville, Ohio 43950
Telephone: (614) 695-1444
Counsel for the Petitioner
Saginaw Mining Company

February 22, 1985

84-1344

No.

Office Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SAGINAW MINING COMPANY,
Petitioner,

v.

LEWIS GIBAS,
Claimant-Respondent,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

and

THE BENEFITS REVIEW BOARD,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

GERALD P. DUFF
(Counsel of Record)
HANLON, DUFF & PALEUDIS, Co., LPA
46770 National Road West
P. O. Box 77
St. Clairsville, Ohio 43950
Telephone: (614) 695-1444
Counsel for the Petitioner Saginaw Mining Company

February 22, 1985

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 83-3408

LEWIS GIBAS,

Petitioner,

v.

SAGINAW MINING COMPANY; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; and BENEFITS REVIEW BOARD,

Respondents.

On Petition for Review of an Order of the Benefits Review Board

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Decided and Filed November 26, 1984

Before: MARTIN and KRUPANSKY, Circuit Judges; and MCRAE, Chief District Judge.*

BOYCE F. MARTIN, JR., Circuit Judge. The question presented is whether the Benefits Review Board, an administrative tribunal within the Department of Labor, is vested with the adjudicatory authority to declare invalid a regulation of the Secretary. Additionally, we are asked to determine whether, if the Board has such power, that power was properly exercised in this case.

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* Honorable Robert M. McRae, Jr., Chief United States District Judge for the Western District of Tennessee, sitting by designation.

Lewis Gibas, a fifty-nine-year-old coal miner, petitions for review of a final decision by the Benefits Review Board, United States Department of Labor, denying him benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 et seq. The Board's decision reversed a determination by an administrative law judge who had awarded Gibas benefits for disability resulting from pneumoconiosis.[1] The Director, Office of Workers' Compensation Programs, of the Department of Labor supports Gibas' petition;[2] his employer, Saginaw Mining Company, opposes it. This court has jurisdiction under 33 U.S.C. § 921(c) (1976).

Gibas was born on November 8, 1924. He has an eighth-grade education. He worked as a coal miner with Saginaw for twenty-four years. He left Saginaw on June 24, 1978 due to a heart ailment. He has not worked since then.

On May 1, 1977, Gibas applied for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 et seq. The Department of Labor found him eligible for benefits and named Saginaw as the employer responsible for payment of the benefits. Saginaw challenged this decision, and an administrative hearing was held. After the hearing, the administrative law judge found Gibas disabled and entitled to benefits. The judge concluded that Gibas had successfully invoked the interim presumption of 20 C.F.R. § 727.203(a) (1984). Under that provision, an individual with ten years of coal mine employment "will be pre-

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[1] Pneumoconiosis is "a disease of the lungs caused by the habitual inhalation of irritant mineral or metalic particles." *Webster's New Collegiate Dictionary*, p. 878 (1981). *See Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 6-7 (1976).

[2] The Director is permitted to seek review of Board decisions in the courts to "ensure proper and consistent administration" of the Act. *Shahady* v. *Atlas Tile & Marble Co.*, 673 F.2d 479, 483 (D.C. Cir. 1982) (per curiam). *See also Director, OWCP* v. *Eastern Coal Corp.*, 561 F.2d 632, 641-49 (6th Cir. 1977).

sumed to be totally disabled due to pneumoconiosis . . . arising out of that employment" if: (1) x-rays establish the existence of pneumoconiosis, (2) ventilatory tests indicate the existence of a chronic respiratory or pulmonary disease, or (3) blood gas studies demonstrate the presence of a transfer of oxygen impairment. 20 C.F.R. § 727.203(a)(1)-(3) (1984). In particular, the judge found that Gibas had introduced sufficient x-ray evidence to satisfy the requirement of section 727.203(a)(1). The judge relied on the x-ray report of Dr. J. S. Gordonson, a B-Reader,[3] which revealed a positive test for pneumoconiosis. The judge concluded that Gibas' complaints of shortness of breath, first reported in 1965, and length of employment as a coal miner, when considered with Dr. Gordonson's x-ray reading, established a rebuttable presumption of disability due to pneumoconiosis.

The administrative law judge rejected Saginaw's contention that it had introduced sufficient medical evidence to rebut the presumption of disability pursuant to 20 C.F.R. § 727.203(b)(3) (1984). Under this provision, Saginaw was required to submit "evidence establish[ing] that the disability . . . of the miner did not arise *in whole or in part* out of coal mine employment." 20 C.F.R. § 727.203(b)(3) (1984) (emphasis added). In support of its assertion Saginaw argued that the report of Dr. George Kress, which opined that Gibas' disability was due to cardiovascular disease, and not pneumoconiosis, satisfied the rebuttal test of section 727.203(b)(3). The administrative law judge, however, disagreed. He noted:

> It is recognized that the claimant has serious cardiovascular problems, that these problems led to his retirement in June 1978 and contribute to his present shortness of breath and that apparently his pneu-

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[3] "B-readers" have the greatest expertise and training for evaluating x-rays. *See Hatfield* v. *Secretary of Health and Human Services*, 743 F.2d 1151, 1154 n.3 (6th Cir. 1984).

moconiosis by itself, did not prevent him from working in June 1978 or earlier. However it is also true that the claimant has penumoconiosis, [sic] that penumoconiosis [sic] is a progressive and irreversible disease, that it could have continued to progress in severity, in the claimant's case, after June 1978 and that Dr. Del Vecchio found evidence of small airway disease in January 1980.

In view of the facts that the claimant worked in coal mines about 24 to 29 years under dusty conditions, that his May 1979 x-ray shows simple pneumoconiosis and that he is clearly disabled by conditions including shortness of breath, I believe that it would be unduly speculative to attribute all of his disability to his cardiovascular impairment and none of it to his pneumoconiosis, and I decline to do so. I conclude that the evidence fails to show that the claimant's present disability, during the period since May 1979, does not arise at least in part from his pneumoconiosis, or that he would now be able to do his previous coal mine work as far as any pulmonary or respiratory impairment is concerned. (No showing has been made as to the availability of comparable and gainful work.)

In view of the foregoing, it is concluded that the employer has not rebutted the interim presumption of totally disabling pneumoconiosis and that the claimant is entitled to benefits.

Saginaw then appealed to the benefits Review Board, which reversed. The Board, although upholding the administrative law judge's finding that Gibas had successfully invoked the interim presumption of section 727.203 (a) (1), nonetheless reversed because the judge had applied section 727.203 (b) (3) as written, rather than as rewritten by the Board in its decision in *Jones* v. *The*

New River Company, 3 Black Lung Rep. 1-199 (1981).[4] In *Jones*, the Board found that the "in whole or in part" language of section 727.203(b)(3) was inconsistent with 30 U.S.C. § 901(a) and 902(f)(1) (Supp. V 1981). The Board held section 727.203(b)(3) invalid "insofar as it permits awards for disability caused only in part by diseases arising out of coal mine employment." *Jones*, 3 Black Lung Rep. at 1-208. In the Board's view, section 727.203(b)(3), as written by the Secretary, permits awarding benefits "to claimants who are *only partially* disabled due to pneumoconiosis" when it requires that the employer "show that *no part* of the total disability arose out of coal mine employment." *Id.* at 1-208-209. Because the Black Lung Benefits Act provides benefits only to those who are "totally disabled due to pneumoconiosis," 30 U.S.C. § 901, the Board felt that any regulation that allowed for disability resulting in part from pneumoconiosis was not in accordance with the law. Consequently, the Board ruled that the words "in whole or in part" should be stricken from the regulation. Under the Board's revised provision, a presumption of disability would be rebutted under section 727.203(b)(3) "if it is shown that total disability . . . did not arise out of coal mine employment." *Jones*, at 1-209.

Applying the *Jones* ruling to Gibas' claim, the Board concluded that the administrative law judge had erred when he measured Saginaw's rebuttal evidence under the regulation as written by the Secretary. The Board then noted that the judge had erred in rejecting Dr. Kress' opinion that Gibas' disability was totally due to heart disease. The Board found that Dr. Kress' report was based upon sufficient documentation and uncontradicted

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[4] Because the Board ruled that the administrative law judge had erred in his interpretation of section 727.203(b)(3), it did not reach Saginaw's other contentions that it had also rebutted the presumption pursuant to 727.203(b)(2) and (b)(4). Saginaw has not reasserted these contentions here.

by other medical evidence. Thus the Board held that "the interim presumption [was] rebutted pursuant to 20 C.F.R. § 727.203(b)(3) as a *matter of law*." (emphasis added).[5]

Both the Director and Gibas contend that the Board lacked the statutory or constitutional authority to invalidate the Secretary's regulation. Alternatively, they contend the Board has misinterpreted section 727.203(b)(3). Gibas also asserts that Saginaw has not satisfied its burden of refuting the interim presumption claimed under 727.203(a)(1). Saginaw, on the other hand, argues that the Board did not act beyond its authority when it declared section 727.203(b)(3) invalid; it further argues that there is not substantial evidence in the record to support the administrative law judge's determination that Gibas is disabled due to pneumoconiosis.

Congress adopted the Black Lung Benefits Act in response to the significant number of coal miners who were disabled due to pneumoconiosis as a result of extended employment in the nation's underground coal mines. The purpose behind the enactment of the Act was to "provide benefits, in cooperation with the States, to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease." 30 U.S.C. § 901. Under the Act, the Secretary of Labor was given the authority to establish regulations and guidelines for determining whether a coal miner's pneumoconiosis "arose out of em-

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[5] As we read the Board's decision, the administrative law judge erred because he failed to apply section 727.203(b)(3) as rewritten by the Board in *Jones* v. *The New River Company*, *supra*. We therefore disagree with Saginaw's contention that the Board issued an additional, alternative ruling that the presumption was rebutted even under 727.203(b)(3) as written by the Secretary, notwithstanding the *Jones* ruling. In other words, without the Board's revision of section 727.203(b)(3), the administrative law judge properly found Gibas entitled to benefits and Saginaw has failed to rebut the presumption of disability.

ployment in a particular underground coal mine or mines." 30 U.S.C. § 932(h).

In 1972 Congress amended the Longshoremen's and Harbor Workers' Compensation Act of 1927, as amended, 33 U.S.C. § 901, to provide a new administrative process for benefits requests under several federal workers' compensation programs. *See* S. Rep. No. 1125, 92d Cong., 2d Sess. 13-15. The Black Lung Benefits Act was one of the compensation programs affected by the amendments. *See Director, OWCP v. National Mines Corp.*, 554 F.2d 1267, 1272-73 (4th Cir. 1977). Before the 1972 amendments, deputy commissioners adjudicated requests for benefits. The decision of the deputy commissioners were then reviewable by the district courts, with further review available in the courts of appeals. The 1972 amendments altered this procedure and vested the formal adjudication of benefits requests in administrative law judges, 33 U.S.C. § 919(d), who resolve the initial factual and legal issues presented in each case.

The 1972 amendments also established a three-person Benefits Review Board to review the determinations of the administrative law judges. 33 U.S.C. § 921(b)(3). Under the new procedures, the Board was placed "*within* the Department of Labor," S. Rep. No. 1125, *supra*, at 13-14 (emphasis added), to provide an internal administrative body for the review of benefits requests. As described by the Secretary's own regulations, "the functions of the . . . Board are quasi-judicial in nature and involve review of decisions made in the administration" of the Act. 20 C.F.R. § 801.103 (1984). Congress expressly granted the Board the authority to hear and decide appeals raising a substantial question of law or fact. 33 U.S.C. § 921(b)(3). However, the Board may not engage in *de novo* review of an administrative law judge's determination. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1037 (5th Cir. 1981). Also, an administrative law judge's findings of fact and conclusions of law

may only be set aside by the Board if not supported by substantial evidence, or not in accordance with the law. 20 C.F.R. § 802.301 (1984); *Director, OWCP* v. *Rowe*, 710 F.2d 251, 254 (6th Cir. 1983). Thus the Board "performs a review function identical to that which the District Courts performed prior to the 1972 amendments." *Kalaris* v. *Donovan*, 697 F.2d 376, 382 (D.C. Cir.), *cert. denied*, —— U.S. ——, 103 S. Ct. 3088 (1983). Rulings of the Board are appealable to the courts of appeals. Our review is limited to "scrutiniz[ing] Board decisions for errors of law and for adherence to the statutory standard governing the Board's review of the administrative law judge's factual determinations." *Director, OWCP* v. *Rowe*, 710 F.2d at 254 (quoting *Bumble Bee Seafoods* v. *Director, OWCP*, 629 F.2d 1327, 1329 (9th Cir. 1980)).

The Director and Gibas assert that the Board lacks the authority to declare the Secretary's regulations invalid. They argue that because the Board is not an Article III court, *see Kalaris* v. *Donovan*, 697 F.2d at 386, and its members are appointed at the Secretary's discretion, *id.* at 401, it lacks the authority to declare a regulation invalid. They contend the Board was established only to administer Department of Labor policy. Under this view, the Board is seen as one of two "arms" of the Secretary—the other being the Director—that were created to administer and implement the Secretary's policies under the Act. Permitting the Board to invalidate the Secretary's regulations, they argue, would create administrative obstacles to effective implementation of the Act and undermine the Secretary's policymaking authority.

Although the Supreme Court has not directly spoken on the authority of the Benefits Review Board to declare one of the Secretary's regulations invalid,[6] several other

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[6] We do not consider the dicta in *Potomac Electric Power Co.* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980), that the Board is not a policymaking agency to be dispositive on the issue presented here.

courts have suggested that administrative bodies like the Board do not have the authority to adjudicate the validity of legislation which they are charged with administering. *American Stevedores, Inc.* v. *Salzano*, 538 F.2d 933, 936 (2d Cir. 1976); *Finnerty* v. *Cowen*, 508 F.2d 979, 982 (2d Cir. 1974); *Downen* v. *Warner*, 481 F.2d 642, 643 (9th Cir. 1973). The appropriate analysis for determining this issue is set out in *Panitz* v. *District of Columbia*, 112 F.2d 39 (D.C. Cir. 1940). There Judge (later Justice) Vinson ruled that a court should first ask whether the agency has the inherent power to rule on the objections to the legislation. Next, a court should ascertain if the act, or regulations adopted pursuant thereto, purport to vest the agency with the authority to rule on challenges to the legislation. *Panitz*, 112 F.2d at 41-42. Applying the *Panitz* test here, we find first that the Benefits Review Board does not have the inherent authority to rule on the validity of the Secretary's regulations because it is not an Article III court. *See Kalaris* v. *Donovan*, 697 F.2d at 384-89. Under our constitutional system, "[t]he judicial power of the United States [is] exercised by courts having the attributes prescribed in Article III of the Constitution." *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 59 (1982). Those attributes are:

> The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Art. III, § 1. Here, it is undisputed that Board members do not enjoy the benefits of life tenure and the guarantee against salary diminution. Moreover, other "essential attributes of the judicial power" were not vested in the Board, including the power of subpoena, the power to hold an individual for contempt and the power to have its order enforced. 33 U.S.C. §§ 927, 921(d).

Additionally, courts have refused "to recognize in administrative officers any inherent power to nullify legislative [or executive] enactments because of personal belief that they contravene the [C]onstitution." *Panitz*, 112 F.2d at 42 (footnote and citations omitted). Rather, administrative agencies are vested only with the authority given to them by Congress. *Cf. Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 213-14 (1976) (rulemaking authority of an administrative agency in charge of administrating federal statute is not the power to make law); *Social Security Board* v. *Nierotko*, 327 U.S. 358, 369 (1946) (an administrative agency may not finally decide the limits of its statutory power; this is a judicial function).

We do conclude, however, that Congress has vested the Board with the statutory power to decide substantive questions of law, *see* 33 U.S.C. § 921(b)(3), and we therefore find that the Board did not act beyond its authority in ruling on the validity of 20 C.F.R. § 727.203 (b)(3).

Our determination is supported by the clear statutory language of 33 U.S.C. § 921(b)(3), which expressly authorizes the Board "to hear and determine appeals raising a substantial *question of law* or fact." (emphasis added). The Secretary has advanced no reason why this positive grant of authority should be narrowly construed to preclude the Board from ruling on the validity of the challenged regulation. The power to decide "substantial question[s] of law," in our view, clearly implies the power to determine whether a regulation is in accord with the Act.

It is equally clear that the Board was established to fulfill the review function previously performed by the district courts. *Nacirema Operating Co., Inc.* v. *Benefits Review Board*, 538 F.2d 73,75 (3d Cir. 1976); Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 Colum. L. Rev.

13, 36-37 (1975). Surely Congress anticipated that the Board would be called upon to decide substantive legal issues in its role as an appellate tribunal under the Act. Without this additional layer of appellate review, the courts of appeals would be confronted with cases which had not undergone the "screening procedure" previously provided by the district courts.

Concededly, the Board, like the district courts under the earlier law, is granted limited authority in its review of administrative determinations. 33 U.S.C. § 921(b)(3). "It is not empowered to engage in a *de novo* review but rather is limited to reviewing the [administrative law judge's] decision for errors of law and to determine whether the factual findings are supported by substantial evidence in the record viewed as a whole."[7] *Director, OWCP* v. *Rowe*, 710 F.2d at 254. Nonetheless, the composition and operating procedures of the Board are akin to a judicial forum. Board members are appointed by the Secretary "from among individuals who are especially qualified to serve" on the Board. 20 C.F.R. § 801.201 (1984). Board members are precluded from considering matters where a possible conflict of interest may be present. Further, after their tenure on the board, former members may not become involved with any matter which had been considered by them in their official capacity. 20 C.F.R. § 801.203 (1984). Additionally, in hearings before the Board the parties are entitled to be represented by an attorney, submit written argument, request oral argument and receive a written opinion explaining the Board's decision. 20 C.F.R. §§ 802.202, 802.306 and 802.403 (1984). Thus the Board cannot be described as a tribunal "wholly unsuitable" for the adjudication of substantive legal claims. *Oestereich* v. *Selective Service*

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[7] The Board will not adjudicate claims not raised before the administrative law judge. *Moore* v. *Paycor, Inc.*, 11 B.R.B.S. 483, 492-93 (1979). Nor does the Board consider new evidence or reweigh the evidence presented below. 20 C.F.R. § 802.301 (1984).

System, 393 U.S. 233, 242 (1968) (Harlan, J., concurring). In sum, the Board performs the identical appellate function previously performed by the district courts. Therefore, it appears that Congress intended to vest in the Board the same judicial power to rule on substantive legal questions as was possessed by the district courts. *See Carozza* v. *United States Steel Corp.*, 727 F.2d 74 (3d Cir. 1984).

Other courts, in different legal contexts, have also recognized the Board's power to decide substantive legal claims. Courts have recognized the Board's power to determine whether a claimant for federal benefits was decedent's "wife" under state domestic relations laws, *Ryan-Walsh Stevedoring Co., Inc.* v. *Trainer*, 601 F.2d 1306 (5th Cir. 1979); whether weekly death benefits payable under the Longshoremen's and Harbor Workers' Compensation Act are subject to the limitations imposed by section 6(b)(1) of that Act, *Director, OWCP* v. *O'Keefe*, 545 F.2d 337 (3d Cir. 1976); and whether an administrative law judge may award travel expenses to successful claimants, *Potomac Iron Works* v. *Love*, 673 F.2d 537 (D.C. Cir. 1982) (per curiam). Conversely, the courts of appeals have refused to decide substantive legal questions not presented to the Board in the first instance. *Blevins* v. *Director, OWCP*, 683 F.2d 139, 142-43 (6th Cir. 1982); *General Dynamics Corp.* v. *Sacchetti*, 681 F.2d 37, 40 (1st Cir. 1982). Of course, the courts of appeals retain the plenary authority to review the Board's legal conclusions, *Carozza*, 727 F.2d at 77; *Kalaris*, 697 F.2d at 399; nevertheless, it is apparent that the Board's appellate review provides a screening device for frivolous claims and sharpens the focus of debate if further review is sought in the court of appeals.

Finally, it has been clear since *Crowell* v. *Benson*, 285 U.S. 22 (1932), that Congress can require that the adjudication of congressionally created rights take place in non-Article III tribunals, provided that Article III courts

retain the essential attributes of judicial power. *Carozza*, 727 F.2d at 77; *Kalaris*, 697 F.2d at 388. As articulated by the plurality opinion in *Northern Pipeline Co.* v. *Marathon Pipeline Corp.*, 458 U.S. 50 (1982), "when Congress creates a statutory right, it clearly has the discretion, in defining that right, to . . . provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right." *Northern Pipeline Co.*, 458 U.S. at 83 (footnote omitted). Here, Gibas' claim against Saginaw involves "the liability of one individual to another under the law as defined," *Northern Pipeline Co.*, 458 U.S. at 69-79 (quoting *Crowell* v. *Benson*, 285 U.S. at 51), and thus concerns the adjudication of "private rights." However, Gibas' right to request benefits was created by Congress. Therefore Congress possessed "substantial discretion to prescribe the manner in which that right may be adjudicated—including the assignment to an [administrative tribunal] of some functions historically performed by judges." *Northern Pipeline Co.*, 458 U.S. at 80 (footnote omitted). In our view, this discretion included the authority to give the Benefits Review Board the power to declare invalid a regulation that is not consistent with the Black Lung Benefits Act.

The holding in *Kalaris* does not undermine our conclusion. There the District of Columbia Circuit ruled that the Board is not an Article III court and that the Secretary could remove Board members at his discretion because Congress did not intend to make the Board independent of the Secretary. *Kalaris*, 697 F.2d at 389, 401. These rulings are not dispositive of the issue presented here. First, the Board's non-Article III status does not affect its authority to adjudicate disputes concerning federally created rights. As noted, Congress has substantial discretion to prescribe the manner in which such rights are initially determined. *Northern Pipeline Co.*, 458 U.S. at 83. Second, Congress' refusal to grant the Board independence from the Secretary is not, in our

view, pertinent to whether the Board exceeded its authority in finding that 20 C.F.R. § 727.203(b)(3) is not in accordance with the Black Lung Benefits Act. The decision in *Kalaris* that the Board is not independent of the Secretary was based upon Congress' silence on the issue and the general rule that "the power of removal presumptively is incident to the power of appointment." *Kalaris*, 697 F.2d at 389. *Kalaris* simply did not concern the scope of the Board's adjudicatory authority under the Act.[8]

Although we find that the Board possessed sufficient adjudicatory authority to declare 20 C.F.R. § 727.203(b)(3) invalid, our inquiry is not over. The Board's construction of section 727.203(b)(3) is subject to plenary review here. *Crowell* v. *Benson*, 285 U.S. at 49-50; *Carozza*, 727 F.2d at 77; *Kalaris*, 697 F.2d at 387. In *Jones* v. *The New River Co.*, *supra*, the Board ruled that the "in whole or in part" language of section 727.203(b)(3) was not consistent with the purposes of 30 U.S.C. § 901(a) and 902(f)(1). This determination was error. The Black Lung Benefits Act requires payment of benefits only for total disability due to pneumoconiosis. 30 U.S.C. § 901 and 902(f)(1), 20 C.F.R. § 727.201 (1984). The Board reasoned that section 727.203(b)(3) permitted the award of benefits for less than total disability. However, section 727.203(b)(3) has nothing to do with the degree of a miner's disability. On the contrary, it concerns the burden placed upon an employer in order to rebut the interim presumption of section 727.203(a). Specifically, section 727.203(b)(3) provides an employer the opportunity to rebut the presumption that a miner is "totally disabled" by "establish[ing] that the *total dis-*

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[8] Nor did the rulings in *American Stevedores, Inc.* v. *Salzano*, 538 F.2d 933, 936 (2d Cir. 1976); *Finnerty* v. *Cohen*, 508 F.2d 979, 982 (2d Cir. 1976) and *Dowen* v. *Warner*, 481 F.2d 642, 643 (9th Cir. 1973), address the issue before us. These cases concerned whether exhaustion of administrative relief was necessary before seeking judicial review of constitutional claims in Article III courts.

ability did not arise in whole or in part out of coal mine employment." 20 C.F.R. § 727.203(b)(3) (emphasis added). As explained by Judge Miller in his dissent in *Van Nest* v. *Consolidation Coal Co.*, 3 Black Lung Rep. at 1-538 (1981),

> [w]hen viewed in proper context, "arises in whole or in part" can only mean *arises in whole* or *arises in part*. It is simply without support to infer, as do my colleagues, that "in part" applies to disability rather than causation. . . . The "in part" language plainly refers to, and modifies, causation (arising out of coal mine employment), not the extent of disability.

Thus, section 727.203(b)(3) does not permit the award of benefits for partial disability; it merely grants an employer the chance to prove that a miner's disability did not arise, in whole or in part, from his coal mine employment. If an employer is able to prove that pneumoconiosis played no part in causing a miner's disability, then the employer has satisfied the requirements of section 727.203(b)(3). Where, however, pneumoconiosis is a contributing cause to a miner's total disability, he is conclusively entitled to benefits. *American Coal Co.* v. *Benefits Review Board*, 738 F.2d 387, 391 (10th Cir. 1984); *Bethlehem Mines Corp.* v. *Massey*, 736 F.2d 120, 123 (4th Cir. 1984); *Alabama By-Products* v. *Killingsworth*, 733 F.2d 1511, 1516 n.10 (5th Cir. 1984); *Carozza*, 727 F.2d at 78. This principle is consistent with the Act's goal of providing benefits to those miners "who are totally disabled due to pneumoconiosis arising out of [coal mine] employment." 30 U.S.C. § 901(a).

The record before us reveals that the administrative law judge considered all of Saginaw's evidence. He expressly acknowledged Gibas' "serious cardio-vascular problems" and Dr. Kress' opinion that Gibas' disability was not caused by pneumoconiosis. Nonetheless, the judge also found persuasive evidence that Gibas has pneu-

moconiosis, is disabled from shortness of breath and has been employed as a coal miner for twenty-four to twenty-nine years under dusty conditions. In light of those facts the judge found that Gibas has satisfied the interim presumption of section 727.203(a), and Saginaw had failed to rebut that presumption. We find no error in these conclusions. Saginaw had the burden of proving that Gibas was not totally disabled. *Bethlehem Mines Corp.*, 736 F.2d at 124; *Alabama By-Products*, 733 F.2d at 1514-15; *Consolidation Coal Co.* v. *Smith*, 699 F.2d 446, 449 (8th Cir. 1983); *Hampton* v. *U.S. Dept. of Labor Benefits Review Board*, 678 F.2d 506, 508 (4th Cir. 1982); *McCluskey* v. *Ziegler Coal Co.*, 2 Black Lung Rep. 1-1248, 1272-73 (1981). The administrative law judge concluded that this burden was not met. A review of the record reveals substantial evidence to support this conclusion. Therefore, the decision of the judge was free of factual or legal error.

The judgment of the Board is reversed; the petition for review is granted, and the case is remanded to the Board with instructions that benefits be awarded.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 83-3408

LEWIS GIBAS,
Petitioner,

v.

SAGINAW MINING COMPANY; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS; and BENEFITS REVIEW BOARD,
Respondents.

Before: MARTIN and KRUPANSKY, Circuit Judges; and McRAE, Chief District Judge.

[Filed Nov. 26, 1984]

JUDGMENT

ON PETITION TO REVIEW a decision of the Benefits Review Board.

THIS CAUSE came on to be heard on the transcript of record from the said Agency and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the decision of the said Agency in this cause be and the same is hereby reversed; the petition for review is granted, and the case

is remanded to said Board with instruction that benefits be awarded.

It is further ordered that Petitioner recover from Respondents the costs on appeal, as itemized below.

ENTERED BY ORDER
OF THE COURT

JOHN P. HEHMAN
Clerk

/s/ John P. Hehman
Clerk

Issued as Mandate: December 18, 1984

COSTS: (Costs awarded to appellee)

Filing fee	$ None
Printing	$ 95.20
Total	$ 95.20

A True Copy.

Attest:

/s/ Gary McCarthy
Deputy Clerk

BENEFITS REVIEW BOARD
U.S. DEPARTMENT OF LABOR

No. 81-553 BLA

OWCP No. 271-24-4369

LEWIS GIBAS,
Claimant-Petitioner

v.

SAGINAW MINING COMPANY,
Employer-Respondent

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Party-in-Interest

[Filed May 19, 1983]

Appeal from the Decision and Order of Charles W. Campbell, Administrative Law Judge, United States Department of Labor.

Daniel L. Manring (Barkan & Neff Co.), Columbus, Ohio, for the claimant.

Gerald P. Duff (Kinder, Kinder & Hanlon), St. Clairsville, Ohio, for the employer.

Cornelius S. Donoghue, Jr. (T. Timothy Ryan, Jr., Solicitor of Labor; Donald S. Shire, Associate Solicitor; J. Michael O'Neill, Assistant Counsel for Black Lung Benefits), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: RAMSEY, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

DECISION AND ORDER

RAMSEY, Chief Administrative Appeals Judge:

This is an appeal by the employer from a Decision and Order (80-BLA-2292) of Administrative Law Judge Charles W. Campbell awarding benefits pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (hereinafter, the Act).[1]

The administrative law judge invoked the interim presumption of entitlement on the basis of claimant's twenty-four years of coal mine employment and the x-ray evidence of record. 20 C.F.R. § 727.203(a)(1). The administrative law judge proceeded to consider the evidence under the standards of Section 727.203(b) and concluded that employer failed to rebut the interim presumption by all available methods.

In its appeal, employer contends that both invocation of the interim presumption upon a finding of simple pneumoconiosis and limitations on rebuttal evidence found in Section 727.203 are unconstitutional. Alternatively, employer contends that, based on the x-ray evidence before him, the administrative law judge erred in invoking the interim presumtion. Lastly, employer argues that the uncontradicted medical opinion evidence rebuts the interim presumption as a matter of law. The claimant maintains that substantial evidence supports the decision below.

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[1] Although the present case was pending on appeal on January 1, 1982, the effective date of the Black Lung Benefits Amendments of 1981, it appears from the record before us that the Amendments do not affect the disposition of this case.

In reviewing the administrative law judge's Decision and Order, the Board's role is narrowly circumscribed. If the administrative law judge's findings of fact are supported by substantial evidence and are not irrational and his rulings are in accordance with law, they are binding upon this Board and may not be disturbed. 33 U.S.C. § 921(b)(3); as incorporated by 30 U.S.C. § 932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates Inc.*, 380 U.S. 359 (1965).

Both of employer's constitutional arguments were addressed by the Board in *Jones v. The New River Co.*, 3 BLR 1-199 (1981), and rejected therein. Therefore, I decline to address them again.

The employer next contends that the administrative law judge erred in invoking the interim presumption based on the x-ray evidence. I disagree. Three chest films are found in the record. The earliest, dated May 18, 1979, was originally read as negative by Dr. R. Stupar, but subsequently re-read as 1/0 p by Dr. J. S. Gordonson, a B-reader. Director's Exhibits Nos. 10 & 11. The other films made in June 1979 and January 1980 were read as negative and 0/1 p respectively by non-B-readers. Director's Exhibit No. 15; Claimant's Exhibit No. 1. The administrative law judge considered all the x-rays, but accorded Dr. Gordonson's reading greater weight because of the expertise and special training of B-readers.

I reject employer's argument that the later evidence rule found in *Call v. Director*, 2 BLR 1-146 (1979), and similar cases compelled the administrative law judge to give greater weight to the negative readings. Although the administrative law judge could have given greater weight to the later negative reading, it was entirely proper for the administrative law judge to accord greater weight to an x-ray interpreted by a B-reader, especially where the earliest film is positive and the time period separating the first and last films is comparatively brief. *Burch v. Old Ben Coal Co.*, 4 BLR 1-229 (1981) (opinion of J. Miller).

Employer's final contention is that the administrative law judge erred in failing to conclude that the medical opinion of Dr. George Kress rebutted the interim presumption pursuant to 20 C.F.R. § 727.203(b)(3).[2]

Dr. Kress examined the claimant in June 1979 and in October 1980 was deposed concerning the results of his examination. On the basis of medical and employment histories, a chest x-ray, an electrocardiograph, and pulmonary function studies, Dr. Kress diagnosed uncontrolled hypertension, old myocardial infarction, and recurrent congestive heart failure all unrelated to the claimant's coal mine employment. In Dr. Kress's opinion, the claimant's shortness of breath is due to his cardiovascular disease. Dr. Kress found no disability which can be attributed to claiman't respiratory system, but opined that claimant is totally disabled due to hypertension and coronary artery insufficiency alone. Director's Exhibit No. 15; Employer's Exhibit No. 3.

In considering the opinion of Dr. Kress and in concluding that the interim presumption was not rebuttted pursuant to Section 727.203(b)(3), the administrative law judge stated,

> In view of the facts that the claimant worked in coal mines about 24 to 29 years under dusty conditions, that his May 1979 x-ray shows simple pneumoconiosis and that he is clearly disabled by conditions including shortness of breath, I believe that it would be unduly speculative to attribute all of his disability to his cardiovascular impairment and none of it to his pneumoconiosis, and I decline to do so. I conclude that the evidence fails to show that the claimant's present disability, during the period since May

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[2] Employer also contends that the presumption was rebutted pursuant to Section 727.203(b)(2) and (b)(4). Based on my holding, *infra*, that the presumption was rebutted pursuant to Section (b)(3) these contentions need not be addressed.

> 1979, does not arise at least in part from his pneumoconiosis. . .

Decision and Order, p. 4.

The administrative law judge incorrectly interpreted Section 727.203(b)(3) as requiring employer to establish that the miner's disability did not arise "at least in part" out of his coal mine employment. In *Jones*, the Board excised the "in whole or in part" language from (b)(3) and held that the presumption is rebutted pursuant to this subsection if it is established that the miner's disability did not arise out of coal mine employment. *Jones, supra. See also Kertesz v. Crescent Hills Coal Co.*, 3 BLR 1-367 (1981). Thus, a showing that the miner's disability is totally due to heart disease has been held sufficient to support subsection (b)(3) rebuttal. *See Starika v. Director*, 4 BLR 1-434 (1982).

Furthermore, the administrative law judge erred in rejecting Dr. Kress's opinion that claimant's disability was totally due to heart disease as "unduly speculative." Dr. Kress's report was based on adequate documentation as defined by the Board in *Gomola v. Manor Mining and Contracting Corp.*, 2 BLR 1-130 (1970), and the documentation supports his conclusions. Moreover, a review of the record reveals that there is no medical opinion contradicting Dr. Kress's conclusion. Inasmuch as Dr. Kress's opinion was improperly rejected and stands uncontradicted, we conclude that the interim presumption is rebutted pursuant to 20 C.F.R. § 727.203(b)(3) as a matter of law.

The Decision and Order awarding benefits below is reversed.

SO ORDERED.

/s/ Robert L. Ramsey
ROBERT L. RAMSEY
Chief Administrative Appeals Judge

KALARIS, Administrative Appeals Judge, concurring:

I concur with my colleague's disposition of the issues in this case. I note that, in rejecting the employer's constitutional challenges to 20 C.F.R. §§ 727.203(a)(1) and (b) and in holding that the administrative law judge erred in applying an improper subsection (b)(3) rebuttal standard, Judge Ramsey relies on the Board's decision in *Jones v. The New River Co.*, 3 BLR 1-199 (1981). The Board's ruling that the interim presumption of Section 727.203(a)(1) and the rebuttal provisions enumerated in Section 727.203(b) are constitutional and its interpretation of subsection (b)(3) rebuttal have been premised on the belief that the Board has the authority to determine the constitutionality and validity of the regulations promulgated by the Secretary of Labor. *McCluskey v. Zeigler Coal Co.*, 2 BLR 1-1248 (1981); *Jones, supra.* The Solicitor of Labor, representing the Director (delegate of the Secretary), has consistently taken the position that the Board lacks any such authority. The recent decision of the United States Court of Appeals for the District of Columbia, *Kalaris v. Donovan*, 697 F.2d 386 (D.C. Cir. 1983), may impact on this question. The court in *Kalaris* held that the Board is *not* independent of the Secretary and that the members of the Board may be removed by the Secretary at will. The Board was characterized, at several points, as "an administrative adjunct" of the Secretary which administers Department of Labor policy, an "internal review mechanism," and "an additional layer of administrative review." The effect of the *Kalaris* holding is that Board members who invalidate a regulation of the Secretary not only fail to administer the Secretary's policy but could also be removed from their positions for having invalidated the regulation.

However, the court in *Kalaris*, while indicating that the Secretary has some control and oversight over the Board, did not decide the extent and nature of that control outside of the power to remove at will. The court did

not directly address the issue of whether the Board lacks the authority to determine the constitutionality and validity of the Secretary's regulations. *Cf. Halon v. Director*, 691 F.2d 180 (3d Cir. 1982), *reh'g granted*, —— F.2d —— (3d Cir. Feb. 28, 1983) (No. 82-3066), wherein the court expressed the view that the Board is under an obligation to effectuate the will of Congress as opposed to the explicit requirements of the Secretary of Labor. Consequently, until the Circuit Courts of Appeals rule directly on the Board's authority to determine the validity and constitutionality of the Secretary's regulations, I will continue to adhere to my position as expresed in *Jones*.

Further, with respect to the employer's argument concerning the applicability of the "latest evidence rule" in the evaluation of the x-ray interpretations, I agree with Judge Ramsey that it was entirely proper for the administrative law judge to accord greater weight to an earlier positive x-ray reading rendered by a "B" reader over later negative x-ray readings. Even though the date of the x-rays is a relevant factor to be considered in the evaluation process, the Board has consistently held that there is no mechanical rule requiring that greater or controlling weight be assigned to the most recent x-ray evidence of record. Additionally, in situations as the instant case where the more recent x-ray evidence is negative and directly conflicts with an earlier positive reading, the administrative law judge *may* accord less weight to the dates of the x-rays in light of the recognized principle that negative x-ray readings are not a trustworthy indicator of the absence of the disease. *See Elkins v. Beth-Elkhorn Corp.*, 2 BLR 1-683 (1979). However, this does not mean that the fact finder can never find the more recent negative x-ray evidence more probative if it is preceded by earlier positive x-ray readings. Moreover, it is my view that the Board should neither explicitly nor implicitly set a time period restricting the application of the "latest evidence rule" in such circum-

stances. (*See Burch v. Old Ben Coal Co.*, 4 BLR 1-229, 232 (1981), wherein Judge Miller stated that a period of approximately sixteen months, ". . . a comparatively brief period of time between the first and last x-rays: . . ." warranted the fact finder's refusal to credit the later negative evidence.)

I accordingly concur with the disposition of the issues in this case.

/s/ Ismene M. Kalaris
ISMENE M. KALARIS
Administrative Appeals Judge

MILLER, Administrative Appeals Judge, concurring in the result:

For the reasons expressed in my dissenting opinions in *Van Nest v. Consolidation Coal Co.*, 3 BLR 1-526, 1-534 (1981) and *Hatcher v. Consolidation Coal Co.*, 5 BLR 1-132, 1-145 (1982), I would affirm the administrative law judge's decision granting benefits to the claimant. However, in the interest of ensuring consistency in the Board's decision, *see* my dissenting opinion in *Clites v. Jones & Laughlin Steel Corp.*, 2 BLR 1-1019, 1-1028-33 (1980), *rev'd*, 3 BLR 2-86, —— F.2d —— (3d Cir. 1981), I concur solely in the result of my colleagues' decision based on the Board's prior decisions in *Jones v. The New River Co.*, 3 BLR 1-199 (1981), and *Kertesz v. Crescent Hills Coal Co.*, 3 BLR 1-367 (1981). *See Carozza v. United States Steel Corp.* —— BLR ——, BRB No. 80-1292 BLA (March 17, 1983).

/s/ Julius Miller
JULIUS MILLER
Administrative Appeals Judge

[SEAL]

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
1111 20th St., N.W.
Washington, D.C. 20036

June 6, 1983

Errata

To all parties of record in:

Gibas v. Saginaw Mining Company (Case No. 80-BLA-2292) (OWCP No. 271-24-4369 (BRB No. 81-553 BLA)

The Board's Decision and Order issued May 19, 1983, contained an error in the caption of the case and an incomplete citation on page 9. Please substitute the enclosed corrected pages.

Sincerely,

BENEFITS REVIEW BOARD

/s/ Agnes Kurtz
AGNES KURTZ
Clerk of the Board

BENEFITS REVIEW BOARD
U.S. DEPARTMENT OF LABOR

No. 81-553 BLA

OWCP No. 271-24-4369

LEWIS GIBAS,
Claimant-Respondent

v.

SAGINAW MINING COMPANY,
Employer-Petitioner

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Party-in-Interest

[Filed Jun. 6, 1983]

Appeal from the Decision and Order of Charles W. Campbell, Administrative Law Judge, United States Department of Labor.

Daniel L. Manring (Barkan & Neff Co.), Columbus, Ohio, for the claimant.

Gerald P. Duff (Kinder, Kinder & Hanlon), St. Clairsville, Ohio, for the employer.

Cornelius S. Donoghue, Jr. (T. Timothy Ryan, Jr., Solicitor of Labor; Donald S. Shire, Associate Solicitor; J. Michael O'Neill, Assistant Counsel for Black Lung Benefits), Washington, D.C. for the Director, Office of

Workers' Compensation Programs, United States Department of Labor.

Before: RAMSEY, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

RAMSEY, Chief Administrative Appeals Judge:

DECISION AND ORDER

This is an appeal by the employer from a Decision and Order (80-BLA-2292) of Administrative Law Judge Charles W. Campbell awarding benefits pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30

* * * *

For the reasons expressed in my disenting opinions in *Van Nest v. Consolidation Coal Co.*, 3 BLR 1-526, 1-534 (1981), *rev'd* Nos. 81-3416 and 81-3463 (6th Cir. August 24, 1982) and *Hatcher v. Consolidation Coal Co.*, 5 BLR 1-132, 1-145 (1982), I would affirm the administrative law judge's decision granting benefits to the claimant. However, in the interest of ensuring consistency in the Board's decision, *see* my dissenting opinion in *Clites v. Jones & Laughlin Steel Corp.*, 2 BLR 1-1019, 1-1028-33 (1980), *rev'd*, 3 BLR 2-86, —— F.2d ——, (3d Cir. 1981), I concur solely in the result of my colleagues' decision based on the Board's prior decisions in *Jones v. The New River Co.*, 3 BLR 1-199 (1981), and *Kertesz v. Crescent Hills Coal Co.*, 3 BLR 1-367 (1981). *See Carozza v. United States Steel Corp.*, —— BLR ——, BRB No. 80-1292 BLA (March 17, 1983).

/s/ Julius Miller
JULIUS MILLER
Administrative Appeals Judge

U.S. DEPARTMENT OF LABOR [SEAL]

OFFICE OF ADMINISTRATIVE LAW JUDGES
304A U.S. Post Office and Courthouse
Cincinnati, Ohio 45202

Case No. 80-BLA-2292

OWCP No. 271-24-4369

In the matter of
LEWIS GIBAS,
Claimant

v.

SAGINAW MINING COMPANY,
Employer

OHIO BUREAU OF WORKERS' COMPENSATION,
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party in interest

Date: February 6, 1981

Daniel L. Manring, Esq., For the Claimant

Gerald P. Duff, Esq., For the Employer

Charles W. Campbell, Administrative Law Judge

DECISION AND ORDER—AWARD OF BENEFITS

This proceeding arises from a claim filed by Lewis Gibas, the claimant, for benefits under the Black Lung Benefits Act of 1977, 30 U.S.C. 901 *et seq.* ("Act"). A request for hearing was filed by letter of December 14, 1979, following action by the deputy commissioner. In accordance with the Act and the regulations issued thereunder, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs for a formal hearing.

A formal hearing was held in Wheeling, West Virginia on October 28, 1980, at which the parties were afforded opportunity to present evidence and argument. The regulations issued under the Act are found in title 20 *Code of Federal Regulations.* Regulation section numbers mentioned in this decision and order refer to sections of that title.

The findings of fact and conclusions of law, and the order set forth below are based upon the entire record of the case.[1]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The claimant, Lewis Gibas, was born November 8, 1924 and completed the eight grade (Tr. 8). He has one dependent, his wife, Mildred, to whom he has been married for 28 years (DX 5).

The named employer, Saginaw Mining Company, has stipulated that the claimant has 24 years of coal mine employment (Tr. 7, DX 19). The claimant further testified that he worked for one and one half years prior to World War II in a strip mine (Tr. 9) and from August 1949 to December 1950 as a joy-helper for Werner Colliers, a mine in St. Clairsville, Ohio (Tr. 10). Employ-

[1] The following abbreviations will be used: DX-Director's Exhibit; CX-Claimant's Exhibit; EX-Employer's Exhibit; Tr.-Transcript of hearing.

ment records for the claimant show about 24 years of qualifying coal mine employment, all with Saginaw Mining Company (DX 3). During this employment claimant worked as a timber man, shuttle car operator, wash box operator at the tipple and bit sharpener at the tipple (Tr. 14-19). The claimant's last coal mine employment with Saginaw was June 24, 1978 (DX 3), when he stopped work, apparently due to a heart ailment (DX 1). He has not worked since. Accordingly the employer is the responsible operator within the meaning of the Act and regulations.

The claimant testified that he smoked a half a pack of cigarettes a day for approximately 24 years (Tr. 25).

The claimant reported that he began having breathing problems in 1965 and transferred from underground work to surface work at the tipple. He had a cough which cleared up when he stopped smoking cigarettes in 1969 (CX 1). In 1975 the claimant suffered a heart attack and did not work for one year (Tr. 21). The claimant was hospitalized 12 times from 1975 to 1978 for heart problems (Tr. 29). The claimant stated that he quit his work because his chest bothered him to the point that he was no longer able to do the work (Tr. 22). He stated that he was unable to sleep in his bed without two pillows, and could not walk up a hill or steps because of shortness of breath (Tr. 24). He took various medications for his heart condition, including Predisone, Theolair, Lasix, Inderal, Lanoxin, Dyazide, Butazolidin, Timetapp, Motrin, aspirin and nitroglycerin on occasion (Tr. 26). The claimant also suffers from swelling in his knees and sometimes uses crutches to walk (Tr. 27).

Since the claimant has well over 10 years of coal mine employment, he is presumed to be totally disabled due to pneumoconiosis arising out of that employment if he meets one of the four medical criteria in subparagraphs (a)(1) through (4) of § 727.203. Three X-rays were

taken of the claimant. The first, taken May 18, 1979 was read by Dr. Stupar as negative for pneumoconiosis (DX 11). However, this was reread by Dr. Gordonson, a B reader, as showing 1/0 p opacities in all six lung zones, which is a positive reading for the presence of pneumoconiosis (DX 10). An X-ray taken on June 19, 1979 was read as negative for pneumoconiosis by George O. Kress, M.D. on behalf of the employer (DX 15). An X-ray taken January 2, 1980 was read as negative for pneumoconiosis by Dr. Del Vecchio, (0/1 p) (CX 1). Because of the expertise and special training of B readers, their reports may be given greater weight. I find that Dr. Gordonson's positive reading for pneumoconiosis, considered together with the claimant's length of coal mine employment, raises a rebuttable presumption that he is totally disabled due to pneumoconiosis arising out of that employment.

Three pulmonary function studies performed on the claimant appear in the record. The first, conducted on May 18, 1979 as part of Dr. Pandian's examination, does not show values which meet the requirements of § 727.203(a)(2). The second was performed on June 19, 1979 by Dr. Kress. The values meet the requirements of subsection (a)(2), but Dr. Kress stated the claimant's effort was not maximum, apparently due to the claimant's fear of chest pain. This conclusion of submaximal effort is consistent with the normal results achieved only a month earlier. The final test, included in Dr. Del Vecchio's report, was conducted on January 21, 1980 and showed FEV 1 and MVV readings which meet the requirements of the table in § 727.203 (a)(2) and provide a further basis for invoking the presumption. Dr. Del Vecchio diagnosed, among other things, "mild" pneumoconiosis with the pulmonary function studies showing evidence of small airway disease.

The blood gas studies of record do not meet the table values of § 727.203(b)(3) (CX 1, DX 8), and there is no medical opinion evidence to the effect that the claimant is totally disabled due to pneumoconiosis.

The presumption of disability invoked in favor of the claimant is not rebutted under any of the four grounds set forth in § 727.203(b). Rebuttal is not available under § 727.203(b)(1) because the claimant is not now doing his usual coal mine work or any comparable and gainful work or under § 727.203(b)(4) in view of the X-ray showing of simple pneumoconiosis.

The evidence also fails to show that the claimant is able to do his usual coal mine work or comparable and gainful work or that his disability did not arise at least in part out of his coal mine employment. Dr. Pandian's opinion in May 1979 that the claimant would "fit for the normal work he used to do" was based in part on a negative X-ray reading and in part on the normal May 1979 pulmonary function studies, whereas the more recent January 1980 studies showed definite reduction of pulmonary function. Accordingly, it is concluded that Dr. Pandian's report does not establish either ability to work or that the claimant's disability is not due at least in part to pneumoconiosis.

The employer has argued that the report and deposition of Dr. Kress establishes that the claimant would be able to do his usual work from a pulmonary or respiratory standpoint and that the claimant's disability is not caused by pneumoconiosis, even in part. However Dr. Kress relied in part on a negative X-ray reading, which as stated above, appears to be contrary to the weight of the X-ray evidence. Dr. Kress did state an opinion that the claimant was disabled, but he considered that this was entirely due to cardiovascular disease, which Dr. Kress considered to be the cause of the claimant's progressive shortness of breath.

It is recognized that the claimant has serious cardiovascular problems, that these problems led to his retirement in June 1978 and contribute to his present shortness of breath and that apparently his pneumoconiosis, by

itself, did not prevent him from working in June 1978 or earlier. However it is also true that the claimant has pneumoconiosis, that pneumoconiosis is a progressive and irreversible disease, that it could have continued progress in severity, in the claimant's case, after June 1978 and that Dr. Del Vecchio found evidence of small airway disease in January 1980.

In view of the facts that the claimant worked in coal mines about 24 to 29 years under dusty conditions, that his May 1979 X-ray shows simple pneumoconiosis and that he is clearly disabled by conditions including shortness of breath, I believe that it would be unduly speculative to attribute all of his disability to his cardiovascular impairment and none of it to his pneumoconiosis, and I decline to do so. I conclude that the evidence fails to show that the claimant's present disability, during the period since May 1979, does not arise at least in part from his pneumoconiosis, or that he would now be able to do his previous coal mine work as far as any pulmonary or respiratory impairment is concerned. (No showing has been made as to the availability of comparable and gainful work.)

In view of the foregoing, it is concluded that the employer has not rebutted the interim presumption of totally disabling pneumoconiosis and that the claimant is entitled to benefits.

ATTORNEY FEES

The attorney for the claimant has submitted an application for attorney's fees in this case amounting to $2,225 at the rate of $100 per hour for 22¼ hours. No objections were filed by opposing counsel, and the hours claimed by counsel appear reasonable.

ORDER

The employer, Saginaw Mining Company, is ordered to pay:

1. To the claimant, all benefits to which he is entitled under the Act, augmented by his one dependent described above, commencing May 1, 1979.

2. To the claimant, all medical and hospitalization benefits to which he is entitled for the period commencing May 1, 1979.

3. To the Secretary of Labor, for any payments under the Act he has made to the claimant and to deduct such amounts, as appropriate, from the amounts due under paragraphs 1 and 2, above.

4. To the claimant or to the Secretary of Labor, as appropriate, interest at the rate of six per centum per annum from the date when each payment was due until the date when payment is made.

5. To Daniel L. Manning, Esq., the sum of Two Thousand Two Hundred Twenty-five ($2,225.00) dollars for representation of the claimant during the period April 17, 1980 through December 2, 1980.

/s/ Charles W. Campbell
CHARLES W. CAMPBELL
Administrative Law Judge

FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969

TITLE IV

30 USC § 901 et seq.

(As amended by the Black Lung Benefits Act of 1972)

AN ACT To provide for the protection of the health and safety of persons working in the coal mining industry of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Federal Coal Mine Health and Safety Act of 1969".

* * * *

TITLE IV—BLACK LUNG BENEFITS *

PART A—GENERAL

SEC. 401. Congress finds and declares that there are a significant number of coal miners living today who are totally disabled due to pneumoconiosis arising out of employment in one or more of the Nation's coal mines; that there are a number of survivors of coal miners whose deaths were due to this disease *or who were totally disabled by this disease at the time of their deaths;* and that few States provide benefits for death or disability due to this disease to coal miners or their surviving dependents. It is, therefore, the purpose of this title to provide benefits, in cooperation with the States, to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependent of miners whose death was due to such disease *or who were totally disabled by this disease at the time of their deaths;* and to ensure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis.

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* Amendments made by Black Lung Benefits Act of 1972 shown in italic type.

SEC. 402. For purposes of this title—

(a) *The term "dependent" means—*

(1) a child as defined in subsection (g) without regard to subparagraph (2)(B)(ii) thereof; or

(2) a wife who is a member of the same household as the miner, or is receiving regular contributions from the miner for her support, or whose husband is a miner who has been ordered by a court to contribute to her support, or who meets the requirements of section 216(b)(1) or (2) of the Social Security Act. The determination of an individual's status as the "wife" of a miner shall be made in accordance with section 216(h)(1) of the Social Security Act as if such miner were the "insured individual" referred to therein. The term "wife" also includes a "divorced wife" as defined in section 216(d)(1) of the Social Security Act who is receiving at least one-half of her support, as determined in accordance with regulations prescribed by the Secretary, from the miner, or is receiving substantial contributions from the miner (pursuant to a written agreement), or there is in effect a court order for substantial contributions to her support from such miner.

(b) The term "pneumoconiosis" means a chronic dust disease of the lung arising out of employment in a coal mine.

(c) The term "Secretary" where used in part B means the Secretary of Health, Education, and Welfare, and where used in part C means the Secretary of Labor.

(d) The term "miner" means any individual who is or was employed in a coal mine.

(e) The term "widow" includes the wife living with or dependent for support on the miner at the time of his death, or living apart for reasonable cause or because of his desertion, or who meets the requirements of section

216(c), (1), (2), (3), (4), or (5), and section 216(k) of the Social Security Act, who is not married. The determination of an individual's status as the "widow" of a miner shall be made in accordance with section 216(h)(1) of the Social Security Act as if such miner were the "insured individual" referred to therein. Such term also includes a "surviving divorced wife" as defined in section 216(d)(2) of the Social Security Act who for the month preceding the month in which the miner died, was receiving at least one-half of her support, as determined in accordance with regulations prescribed by the Secretary, from the miner, or was receiving substantial contributions from the miner (pursuant to a written agreement) or there was in effect a court order for substantial contributions to her support from the miner at the time of his death.

(f) The term "total disability" has the meaning given it by regulation of the Secretary of Health, Education, and Welfare, except that such regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time. Such regulations shall not provide more restrictive criteria than those applicable under section 223(d) of the Social Security Act.

(g) The term "child" means a child or a step-child who is—

(1) unmarried; and

(2)(A) under eighteen years of age, or

(B)(i) under a disability as defined in section 223(d) of the Social Security Act,

(ii) which began before the age specified in section 202(d)(1)(B)(ii) of the Social Security Act, or, in

the case of a student, before he ceased to be a student; or

(C) a student.

The term "student" means a "full-time student" as defined in section 202(d)(7) of the Social Security Act, or a "student" as defined in section 8101(17) of title 5, United States Code. The determination of an individual's status as the "child" of the miner or widow, as the case may be, shall be made in accordance with section 216(h)(2) or (3) of the Social Security Act as if such miner or widow were the "insured individual" referred to therein.

BLACK LUNG BENEFITS REFORM ACT OF 1977
PUBLIC LAW 95-239—MARCH 1, 1978

30 U.S.C. § 902(f)

SHORT TITLE

SECTION 1. *This Act may be cited as the "Black Lung Benefits Reform Act of 1977".*

DEFINITIONS

SEC. 2. *(a) Section 402(b) of the Federal Mine Safety and Health Act of 1977 (hereinafter in this Act referred to as the "Act") is amended to read as follows:*

"(b) The term 'pneumoconiosis' means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment.".

(b) Section 402(d) of the Act is amended to read as follows:

"(d) The term 'miner' means any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment.".

(c) Section 402(f) of the Act is amended to read as follows:

"(f)(1) The term 'total disability' has the meaning given it by regulations of the Secretary of Health, Education, and Welfare for claims under part B of this title, and by regulations of the Secretary of Labor for claims under part C of this title, subject to the relevant provisions of subsections (b) and (d) of section 413, except that—

"(A) in the case of a living miner, such regulations shall provide that a miner shall be considered

totally disabled when pneumoconiosis prevents him or her from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity and over a substantial period of time;

"(B) such regulations shall provide that (i) a deceased miner's employment in a mine at the time of death shall not be used as conclusive evidence that the miner was not totally disabled; and (ii) in the case of a living miner, if there are changed circumstances of employment indicative of reduced ability to perform his or her usual coal mine work, such miner's employment in a mine shall not be used as conclusive evidence that the miner is not totally disabled;

"(C) such regulations shall not provide more restrictive criteria than those applicable under section 223(d) of the Social Security Act; and

"(D) the Secretary of Labor, in consultation with the Director of the National Institute for Occupational Safety and Health, shall establish criteria for all appropriate medical tests under this subsection which accurately reflect total disability in coal miners as defined in subparagraph (A).

"(2) Criteria applied by the Secretary of Labor in the case of—

"(A) any claim which is subject to review by the Secretary of Health, Education, and Welfare, or subject to a determination by the Secretary of Labor, under section 435(a);

"(B) any claim which is subject to review by the Secretary of Labor under section 435(b); and

"(C) any claim filed on or before the effective date of regulations promulgated under this subsection by the Secretary of Labor;

shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.".

Section 411(c) of the Act 30 USC 921(c)(5)

(5) In the case of a miner who dies on or before the date of the enactment of the Black Lung Benefits Reform Act of 1977 who was employed for 25 years or more in one or more coal mines before June 30, 1971, the eligible survivors of such miner shall be entitled to the payment of benefits, at the rate applicable under section 412(a)(2), unless it is established that at the time of his or her death, such miner was not partially or totally disabled due to pneumoconiosis. Eligible survivors shall, upon request by the Secretary, furnish such evidence as available with respect to the health of the miner at the time of his or her death.

20 C.F.R. § 410.412 "Total disability" defined.

(a) A miner shall be considered totally disabled due to pneumoconiosis if:

(1) His pneumoconiosis prevents him from engaging in gainful work in the immediate area of his residence requiring the skills and abilities comparable to those of any work in a mine or mines in which he previously engaged with some regularity and over a substantial period of time (that is, "comparable and gainful work"; see §§ 410.424-410.426); and

(2) His impairment can be expected to result in death, or has lasted or can be expected to last for a continuous period of not less than 12 months.

(b) A miner shall be considered to have been totally disabled due to pneumoconiosis at the time of his death, if at the time of his death:

(1) His pneumoconiosis prevented him from engaging in gainful work in the immediate area of his residence requiring the skills and abilities comparable to those of any work in a mine or mines in which he previously engaged with some regularity and over a substantial period of time (that is, "comparable and gainful work"; see §§ 410.424-410.426; and

(2) His impairment was expected to result in death, or it lasted or was expected to last for a continuous period of not less than 12 months.

20 CFR § 727.203

§ 727.203 Interim presumption.

(a) *Establishing interim presumption.* A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, arising out of that employment, if one of the following medical requirements is met:

(1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428 of this title);

(2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2) of this title) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than—	
	FEV_1	MVV
67" or less	2.3	92
68"	2.4	96
69"	2.4	96
70"	2.5	100
71"	2.6	104
72"	2.6	104
73" or more	2.7	106

(3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values which are equal to or less than the values specified in the following table:

Arterial pCO_2	Arterial pO_2 equal to or less than (mm Mg)
30 or below	70
31	69
32	68
33	67
34	66
35	65
36	64
37	63
38	62
39	61
40-45	60
Above 45	Any value

(4) Other medical evidence, including the documented opinion of a physician, exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment;

(5) In the case of a deceased miner where no medical evidence is available, the affidavit of the survivor of such miner or other persons with knowledge of the miner's physical condition, demonstrates the presence of a totally disabling respiratory or pulmonary impairment.

(b) *Rebuttal of interim presumption.* In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:

(1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work

or comparable and gainful work (see § 410.412(a)(1) of this title); or

(3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or

(4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.

(c) *Applicability of Part 718.* Except as is otherwise provided in this section, the provisions of Part 718 of this subchapter as amended from time to time, shall also be applicable to the adjudication of claims under this section.

(d) *Failure of miner to qualify under the presumption in paragraph (a) of this section.* Where eligibility is not established under this section, such eligibility may be established under part 718 of this subchapter as amended from time to time.

20 CFR § 410.426

§ 410.426 Determining total disability: Age, education, and work experience criteria.

(a) Pneumoconiosis which constitutes neither an impairment listed in the appendix to this subpart (see § 410.424), nor the medical equivalent thereof, shall nevertheless be found totally disabling if because of the severity of such impairment, the miner is (or was) not only unable to do his previous coal mine work, but also cannot (or could not), considering his age, his education, and work experience, engage in any other kind of comparable and gainful work (see § 410.412(a)(1)) available to him in the immediate area of his residence. A miner shall be determined to be under a disability only if his pneumoconiosis is (or was) the primary reason for his inability to engage in such comparable and gainful work. Medical impairments other than pneumoconiosis may not be considered.

The following criteria recognize that an impairment in the transfer of oxygen from the lung alveoli to cellular level can exist in an individual even though his chest roentgenogram (X-ray) or ventilatory function tests are normal.

(b) Subject to the limitations in paragraph (a) of this section, pneumoconiosis shall be found disabling if it is established that the miner has (or had) a respiratory impairment because of pneumoconiosis demonstrated on the basis of a ventilatory study in which the maximum voluntary ventilation (MVV) or maximum breathing capacity (MBC), and 1-second forced expiratory volume (FEV), are equal to or less than the values specified in the following table or by a medically equivalent test:

Height (inches)	MVV (MBC) equal to or less than	and	FEV_1 equal to or less than
	L./Min.		L.
57 or less	52		1.4
58	53		1.4
59	54		1.4
60	55		1.5
61	56		1.5
62	57		1.5
63	58		1.5
64	59		1.6
65	60		1.6
66	61		1.6
67	62		1.7
68	63		1.7
69	64		1.8
70	65		1.8
71	66		1.8
72	67		1.9
73 or more	68		1.9

(c) Where the values specified in paragraph (b) of this section are not met, pneumoconiosis may nevertheless be found disabling if a physical performance test establishes a chronic respiratory or pulmonary impairment which is medically the equivalent of the values specified in the table in paragraph (b) of this section. Any decision with respect to such medical equivalence shall be based on medically accepted clinical and laboratory diagnostic techniques including a medical judgment furnished by one or more physicians designated by the Administration.

(d) Where a ventilatory study and/or a physical performance test is medically contraindicated, or cannot be obtained, or where evidence obtained as a result of such tests does not establish that the miner is totally disabled, pneumoconiosis may nevertheless be found totally dis-

abling if other relevant evidence (see § 410.414(c)) establishes that the miner has (or had) a chronic respiratory or pulmonary impairment, the severity of which prevents (or prevented) him not only from doing his previous coal mine work, but also, considering his age, his education, and work experience, prevents (or prevented) him from engaging in comparable and gainful work.

(e) When used in this section, the term "age" refers to chronological age and the extent to which it affects the miner's capacity to engage in comparable and gainful work.

(f) When used in this section, the term "education" is used in the following sense: Education and training are factors in determining the employment capacity of a miner. Lack of formal schooling, however, is not necessarily proof that a miner is an uneducated person. The kinds of responsibilities with which he was charged when working may indicate ability to do more than unskilled work even though his formal education has been limited.

§ 1319 Interim presumption 20 C.F.R. § 410.490

[1] In general

3 BLR: 1-701, 1-764; 2-69

4 BLR: 1-343, 1-507

5 BLR: 1-196, 1-510, 1-529, 1-598

6 BLR: 1-195, 1-393, 1-575, 1-1132

[2] Establishment of

[a] In general, 20 C.F.R. § 410.490(b)

1 BLR: 2-3, 2-71

2 BLR: 1-167

4 BLR: 1-270

5 BLR: 1-427; 2-20, 2-30, 2-115

6 BLR: 1-288, 1-597, 1-1104

[3] Rebuttal of

6 BLR: 1-560

§ 1320 Interim presumption 20 C.F.R. § 727.203

[1] In general

3 BLR: 1-332, 1-466, 1-565, 1-610; 3-30

4 BLR: 1-180, 1-190, 1-229, 1-263, 1-270, 1-285, 1-343, 1-370, 1-398, 1-428, 1-462, 1-467, 1-507, 1-571, 1-586, 1-627, 1-631, 1-635; 3-19, 3-103

5 BLR: 1-56, 1-106, 1-248, 1-357, 1-368, 1-454, 1-499, 1-758

6 BLR: 1-129, 1-723, 1-1042, 1-1143; 2-119

[2] Establishment of

[a] In general, 20 C.F.R. § 727.203(a)

2 BLR: 1-911, 1-946, 1-998, 1-1080

3 BLR: 1-119, 1-169, 1-185, 1-367, 1-422, 1-426, 1-487, 1-557, 1-692, 1-696, 1-710, 1-773; 3-1, 3-57, 3-89, 3-102, 3-158, 3-165

4 BLR: 1-29, 1-123, 1-186, 1-190, 1-221, 1-225, 1-229, 1-237, 1-252, 1-270, 1-285, 1-292, 1-355, 1-370, 1-446, 1-485, 1-489, 1-497, 1-548, 1-591, 1-620, 1-689

5 BLR: 1-75, 1-260, 1-357, 1-419, 1-510, 1-533, 1-650, 1-755, 1-816, 1-881; 2-20, 2-51, 2-84; 3-95

6 BLR: 1-134, 1-221, 1-224, 1-272, 1-575, 1-597, 1-791, 1-834, 1-839, 1-849, 1-875, 1-888, 1-910, 1-933, 1-945, 1-1008, 1-1013, 1-1100, 1-1176, 1-1219

[b] § 727.203(a)(1)

2 BLR: 1-683, 1-886, 1-1178

3 BLR: 1-52, 1-153, 1-163, 1-332, 1-376, 1-466, 1-547, 1-636; 3-41, 3-67, 3-139, 3-171, 3-181, 3-195

4 BLR: 1-7, 1-16, 1-35, 1-123, 1-144, 1-168, 1-221, 1-229, 1-246, 1-261, 1-308, 1-320, 1-329, 1-343, 1-355, 1-370, 1-446, 1-507, 1-527, 1-620, 1-717; 3-109

5 BLR: 1-1, 1-16, 1-49, 1-117, 1-165, 1-289, 1-301, 1-419, 1-525, 1-701, 1-793, 1-896; 3-71, 3-82, 3-95

6 BLR: 1-49, 1-256, 1-307, 1-365, 1-368, 1-376, 1-450, 1-454, 1-521, 1-535, 1-582, 1-636, 1-666, 1-773, 1-784, 1-902, 1-905, 1-930,

1-1083, 1-1130, 1-1151, 1-1185, 1-1189, 1-1276, 1-1291

[c] § 727.203(a)(2)

2 BLR: 1-1217

3 BLR: 1-136, 1-158, 1-163, 1-185, 1-477, 1-487, 1-547, 1-557, 1-575, 1-636, 1-701, 1-710; 3-1, 3-67, 3-139, 3-171, 3-195

4 BLR: 1-164, 1-221, 1-246, 1-261, 1-292, 1-370, 1-446, 1-489, 1-631, 1-667, 1-701, 1-761

5 BLR: 1-49, 1-346, 1-408, 1-586, 1-616

6 BLR: 1-1, 1-87, 1-149, 1-307, 1-314, 1-454, 1-648, 1-767, 1-799, 1-815, 1-820, 1-826, 1-988, 1-1060, 1-1067, 1-1083, 1-1086, 1-1120, 1-1141, 1-1189, 1-1249

[d] § 727.203(a)(3)

3 BLR: 3-79, 3-171, 3-181

4 BLR: 1-229, 1-252, 1-334

5 BLR: 1-320, 1-325, 1-339, 1-408, 1-544, 1-849; 2-130

6 BLR: 1-1, 1-87, 1-149, 1-454, 1-743, 1-767, 1-773, 1-788, 1-797, 1-799, 1-820, 1-1013, 1-1189, 1-1259; 2-102

[e] § 727.203(a)(4)

2 BLR: 1-886

3 BLR: 1-63, 1-153, 1-163, 1-193, 1-380, 1-414, 1-477, 1-487, 1-547, 1-636, 1-692; 3-1, 3-117, 3-139, 3-171, 3-175

4 BLR: 1-35, 1-292, 1-350, 1-446, 1-551, 1-564, 1-601, 1-627; 2-142; 3-32, 3-41

5 BLR: 1-117, 1-275, 1-289, 1-520, 1-533, 1-570, 1-574, 1-613, 1-667, 1-691, 1-844; 2-138; 3-40, 3-71, 3-95

6 BLR: 1-1, 1-84, 1-272, 1-285, 1-307, 1-365, 1-368, 1-423, 1-476, 1-535, 1-564, 1-567, 1-597, 1-601, 1-619, 1-767, 1-773, 1-797, 1-799, 1-826, 1-865, 1-877, 1-888, 1-1086, 1-1127, 1-1130, 1-1138, 1-1164, 1-1185, 1-1189, 1-1214, 1-1219, 11-1222; 2-11, 2-23, 2-73

[f] § 727.203(a)(5)

3 BLR: 1-380, 1-692

4 BLR: 1-571

5 BLR: 1-510, 1-873

6 BLR: 1-757, 1-873, 1-920, 1-993, 1-1203

[3] Rebuttal of

[a] In general, 20 C.F.R. § 727.203(b)

2 BLR: 1-1080, 1-1081, 1-1089

3 BLR: 1-185, 1-332, 1-343, 1-450, 1-547, 1-557, 1-589, 1-668, 1-692, 1-701, 1-710, 1-773; 3-1, 3-41, 3-57, 3-67, 3-150, 3-158, 3-165, 3-175

4 BLR: 1-16, 1-95, 1-159, 1-168, 1-190, 1-221, 1-229, 1-252, 1-308, 1-313, 1-329, 1-377, 1-446, 1-497, 1-551, 1-564, 1-601, 1-627, 1-631, 1-701; 2-82; 3-51, 3-57

5 BLR: 1-75, 1-132, 1-165, 1-196, 1-282, 1-352, 1-474, 1-544, 1-570, 1-590, 1-758; 3-82

6 BLR: 1-33, 1-60, 1-96, 1-110, 1-117, 1-159, 1-408, 1-511, 1-521, 1-571, 1-597, 1-627, 1-631, 1-636, 1-757, 1-760, 1-843, 1-930, 1-988, 1-996, 1-1055, 1-1143, 1-1206; 2-23, 2-42, 259, 2-73, 2-92

[b] § 727.203(b)(1)

3 BLR: 3-8, 3-34, 3-181

4 BLR: 1-159, 1-320, 1-350, 1-717

5 BLR: 1-1, 1-96, 1-896; 2-24

6 BLR: 1-73, 1-606, 1-771, 1-924, 1-996, 1-1088

[c] § 727.203(b)(2)

2 BLR: 1-1081, 1-1089, 1-1217

3 BLR: 1-52, 1-158, 1-185, 1-220, 1-343, 1-367, 1-395, 1-434, 1-450, 1-526, 1-701, 1-764, 1-773, 1-806, 1-822; 3-8, 3-14, 3-21, 3-89, 3-108, 3-128, 3-139

4 BLR: 1-1, 1-35, 1-144, 1-164, 1-190, 1-216, 1-229, 1-270, 1-285, 1-298, 1-308, 1-320, 1-343, 1-365, 1-377, 1-387, 1-411, 1-462, 1-497, 1-511, 1-522, 1-527, 1-534, 1-586, 1-635, 1-646, 1-728, 1-733; 2-119; 3-75

5 BLR: 1-1, 1-56, 1-132, 1-196, 1-227, 1-248, 1-330, 1-378, 1-384, 1-395, 1-400, 1-404, 1-445, 1-457, 1-604, 1-650, 1-718, 1-730, 1-746, 1-816, 1-878, 1-884; 2-24; 3-159

6 BLR: 1-18, 1-67, 1-117, 1-122, 1-227, 1-240, 1-314, 1-361, 1-378, 1-416, 1-430, 1-487, 1-493, 1-521, 1-556, 1-560, 1-622, 1-627, 1-636, 1-643, 1-677, 1-683, 1-693, 1-698, 1-702, 1-706, 7-710, 1-712, 1-734, 1-743, 1-760, 1-780, 1-802, 1-824, 1-829, 1-851, 1-892, 1-924, 1-940, 1-991, 1-996, 1-1000, 1-1039, 1-1048, 1-1055, 1-1064, 1-1088, 1-1094, 1-1107, 1-1146, 1-1157, 1-1197, 1-1209, 1-1217, 1-1234, 1-1249, 1-1259; 2-42, 2-59, 2-68, 2-102

[d] § 727.203(b)(3)

2 BLR: 1-972

3 BLR: 1-63, 1-199, 1-220, 1-343, 1-350, 1-367, 1-410, 1-526, 1-547, 1-622.8, 1-701, 1-822; 3-26, 3-139

4 BLR: 1-1, 1-7, 1-144, 1-175, 1-229, 1-298, 1-320, 1-329, 1-434, 1-489, 1-497, 1-522, 1-571, 1-586, 1-608, 1-635, 1-646, 1-728; 3-32, 3-62

5 BLR: 1-1, 1-37, 1-49, 1-56, 1-65, 1-248, 1-301, 1-419, 1-429, 1-474, 1-604, 1-642, 1-793, 1-816; 3-29

6 BLR: 1-1, 1-23, 1-96, 1-122, 1-314, 1-430, 1-521, 1-556, 1-567, 1-663, 1-666, 1-712, 1-716, 1-720, 1-734, 1-743, 1-788, 1-829, 1-868, 1-940, 1-996, 1-1146, 1-1249, 1-1255, 1-1284, 1-1298, 1-1306, 1-1318; 2-48, 2-59, 2-81

[e] § 727.203(b)(4)

2 BLR: 1-972

3 BLR: 1-158, 1-343, 1-547, 1-575, 1-636, 1-710; 3-26, 3-79, 3-108

4 BLR: 1-7, 1-62, 1-308, 1-320, 1-370, 1-489, 1-552; 3-41

5 BLR: 1-317, 1-429, 1-517

6 BLR: 1-96, 1-314, 1-400, 1-408, 1-521, 1-567, 1-571, 1-579, 1-612, 1-666, 1-743, 1-996, 1-1039, 1-1138, 1-1169, 1-1306; 2-48

[f] § 727.204(d)

4 BLR: 2-137

5 BLR: 1-66; 2-1

[4] Failure to qualify under interim presumption, 20 C.F.R. § 727.203(d)

3 BLR: 1-52, 1-163, 1-350, 1-477, 1-610, 1-627, 1-636, 1-773; 3-187

4 BLR: 1-29, 1-467, 1-564; 3-32, 3-41, 3-62, 3-105

5 BLR: 1-106, 1-165, 1-309, 1-357; 3-116

6 BLR: 1-10

§ 1321 Irebuttable presumption

[1] 30 U.S.C. § 921(c)(3) complicated pneumoconiosis

3 BLR: 2-36

§ 1322 Rebuttal of

[1] 30 U.S.C. § 921(c)(1) causal relationship

1 BLR: 1-297, 1-840

[2] 30 U.S.C. § 921(c)(2) presumption of death due to pneumoconiosis

1 BLR: 1-80

2 BLR: 1-378, 1-1143

[3] 30 U.S.C. § 921(c)(3) complicated pneumoconiosis

1 BLR: 1-671

2 BLR: 1-13

[4] 30 U.S.C. § 921(c)(4) respiratory or pulmunary impairment

1 BLR: 1-87, 1-237, 1-276, 1-298, 1-473, 1-537, 1-754, 1-776, 1-840, 1-898, 1-966

2 BLR: 1-13, 1-82, 1-92, 1-286, 1-378, 1-662, 1-1143, 1-1219

3 BLR: 1-487, 1-526, 1-575, 1-622.8; 2-36

4 BLR: 1-95, 1-313, 1-434

79-386 BLA

OWCP No. 236-22-6652

PHILLIP H. JONES,
Claimant-Respondent

v.

THE NEW RIVER COMPANY,
Employer-Petitioner

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Party-in-Interest

DECISION and ORDER

Syllabus

The Board ruled that the interim presumption of § 727.203(a)(1) was constitutional because evidence submitted to Congress established a rational relationship between the requirements of proving pneumoconiosis by x-ray evidence and ten years of coal mine employment and the presumption of total disability due to pneumoconiosis arising out of coal mine employment. Furthermore, since "Congress has the authority to pass legislation compensating miners for merely contracting pneumoconiosis, be it simple or complicated [i]t therefore makes no sense to invalidate a *rebuttable* presumption such as 20 C.F.R. § 727.203(a)(1), when Congress clearly could lawfully legislate a more far-reaching result than this presumption contemplates." Finally, the administrative problems associated with handling the large

volume of black lung claims are aided by this interim evidentiary rule, providing "another consideration which compels the conclusion that Congress did not act arbitrarily but mandated a rational, constitutional scheme for prompt processing of claims."

Where the record did not show that the employer was hampered in the presentation of its case, the employer lacked standing to argue that it was unconstitutionally deprived of due process because § 727.203 (b) limits the type of evidence it may submit to rebut the interim presumption.

The Board ruled that § 727.203(b)(3) was "not in keeping with the Act," and places an almost impossible burden of proof upon the employer insofar as it allows the interim presumption to remain intact if any *part* of the claimant's disability arose out of coal employment. Consequently, § 727.203(b)(3) should now be read "as though the words 'in whole or in part' were not part [of the regulation], *i.e.* the presumption is rebutted under § 727.203(b)(3) if total disability or death did not arise out of coal mine employment."

The administrative law judge did not err in awarding benefits to commence with the onset of the disability in September 1974, despite the enactment of the Reform Act on March 1, 1978, since the Act provides that previously denied or pending claims are to be reviewed under the Reform Act criteria and that benefits may be awarded as far back as January 1, 1974.

The claimant's adult stepdaughter was properly found to be his dependent for the purposes of augmented benefits where she was considered his disabled child for Social Security purposes, had a low I.Q., was diagnosed mentally retarded, and was unable to successfully complete a vocational rehabilitation program.

Appeal from the Decision and Order and Supplemental Order of Joseph P. Gonzalez, Administrative Law Judge, United States Department of Labor.

William F. Richmond, Jr. (Bowers, Hodson, Henderson & Richmond), Beckley, West Virginia, for the employer.

Elaine Blass (T. Timothy Ryan, Jr., Solicitor of Labor; Laurie M. Streeter, Associate Solicitor; Judith E. Wolf, Co-Counsel for Black Lung Benefits), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

KALARIS, Administrative Appeals Judge:

This is an appeal by the New River Company (hereinafter, the employer) from a Decision and Order and Supplemental Order (78-BLA-145) of Administrative Law Judge Joseph P. Gonzalez awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (hereinafter, the Act).

In this case, the Board is called upon to decide the constitutionality of 20 C.F.R. § 727.203(a)(1), a regulation implementing the Black Lung Benefits Reform Act of 1977 (hereinafter, the Reform Act). This regulation provides a presumption of total disability due to pneumoconiosis arising out of coal mine employment if the miner has 10 years of coal mine employment and chest x-ray, autopsy or biopsy establishes the existence of pneumoconiosis. 20 C.F.R. § 727.203(a)(1).

Following an evidentiary hearing in Beckley, West Virginia on January 5, 1979, the administrative law judge found that the claimant had in excess of 10 years of coal mine employment, and that the claimant had simple pneumoconiosis on the basis of the x-ray evidence.

He further found that the claimant was entitled to the interim presumption of total disability due to pneumoconiosis under 20 C.F.R. § 727.203(a)(1), and that the interim presumption had not been rebutted. Claimant was awarded black lung benefits for himself, his spouse and their dependent children, including his 37-year-old stepdaughter, Evelyn.

Employer raises several issues:

1) Section 727.203(a), 20 C.F.R. § 727.203(a), is unconstitutional because it establishes a presumption based upon improper medical criteria.

2) The limitation on rebuttal evidence under 20 C.F.R. § 727.203(b) is unconstitutional as a denial of due process.

3) The administrative law judge erred in invoking the interim presumption and in finding that it was not rebutted.

4) The administrative law judge erred in determining that payments were to commence as of September 1974 since benefits may not be awarded under the Reform Act for periods prior to the date of its enactment, *i.e.*, March 1, 1978.

5) The administrative law judge erred in finding that the claimant's 37-year-old stepdaughter was disabled and dependent upon him.

The Director contends that the Decision and Order is supported by substantial evidence, is in accordance with law and should be affirmed. The claimant filed no response to employer's petition for review.

In reviewing the administrative law judge's Decision and Order, the Board's role is narrowly circumscribed. If his findings of fact are supported by substantial evidence, are not irrational, and his rulings consistent with applicable law, the decision must be affirmed. 33 U.S.C.

§ 921(b)(3) as incorporated by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates Inc.*, 380 U.S. 359 (1965).

I

We turn first to the employer's challenge to the constitutionality of the interim presumption found at Section 727.203(a) of the regulations.[1] 20 C.F.R. § 727.203 (a). The administrative law judge in the instant case found the Section 727.203(a)(1) presumption invoked based on the x-ray evidence of record. He did not consider any other method of invocation. Accordingly, the employer lacks standing to challenge any method of invocation other than x-ray, *McCluskey v. Ziegler Coal Co.*, 2 BLR 1-1248 (1981), and we will address the constitutionality of Section 727.203(a)(1) x-ray invocation only.

The employer concedes that the x-ray evidence of record establishes the existence of simple pneumoconiosis. Emp. Brief, p. 3. However, it contends that x-rays are not a medical tool designed to demonstrate disability; that there is not a rational relationship between an x-ray showing of simple pneumoconiosis and disability, and that therefore the presumption is unconstitutional.

From a careful perusal of Section 727.203(a)(1), the enabling statute and its legislative history, it must be concluded that Subsection (a)(1) of Section 727.203 is designed to achieve an end consistent with the purposes of the Reform Act, is rational, does not contravene the employer's due process rights under the Fifth Amendment to the United States Constitution, and is therefore

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[1] We have recently held that this Board has the authority to decide the constitutionality and validity of regulations promulgated pursuant to the Act, *McCluskey v. Ziegler Coal Co.*, 2 BLR 1-1248 (1981), thus answering the Director's contention in the instant case that the Board is not the proper forum for the resolution of constitutional issues.

legally valid. My colleague, Judge Miller, concurs in this judgment.

The Secretary's regulations "will be sustained [as valid] as long as [they are] 'reasonably related to the purpose of the enabling legislation' . . . ." *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973), quoting *Thorpe v. Housing Authority*, 393 U.S. 268, 280-81 (1969). Congress adopted the Federal Coal Mine Health and Safety Act of 1969, as amended, "to provide benefits . . . to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease or who were totally disabled by this disease at the time of their death." 30 U.S.C. § 901(a). To this end, the Secretary of Labor is authorized to promulgate "such regulations as [he] deems appropriate to carry out the provisions of [Title IV, Part C, of the Federal Coal Mine Health and Safety Act of 1969, as amended]." 30 U.S.C. § 936(a) Congress mandated that any claim which was pending or denied on the effective date of the Reform Act, March 1, 1978, or any claim filed on or before the effective date of permanent regulations promulgated by the Secretary, March 31, 1980, was to be adjudicated pursuant to criteria not more restrictive than the criteria applicable to a claim filed on June 30, 1973.[2]

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[2] Congress was dissatisfied with the results obtained under the Federal Coal Mine Health and Safety Act of 1969 as originally enacted. *See* S. Rep. No. 92-743, 92d Cong., 2d Sess. (1972), *1972 U.S. Code Cong. and Admin. News*, p. 2307 *et seq.* It was felt that many miners and their survivors for whose benefit the Act had been passed were failing to qualify for benefits under applicable standards. In response, Congress amended the Act in 1972. At the same time, Congress indicated its expectation that the Secretary of Health, Education and Welfare would adopt by regulation "such interim evidentiary rules and disability evaluation criteria as will permit prompt and vigorous processing of the large backlog of claims consistent with the language and intent of these amendments." S. Rep. No. 92-743, 92d Cong., 2d Sess. (1972), *1972 U.S. Code Cong. and Admin. News* at 2322. In response to this directive,

30 U.S.C. § 902(f)(2). The criteria applicable on June 30, 1973, are found at 20 C.F.R. § 410.490. As pertinent here, Section 727.203(a)(1) provides that a presumption of total disability due to pneumoconiosis is available to miners who engage in coal mine employment for at least 10 years and who establish the existence of pneumoconiosis on the basis of a chest x-ray, biopsy or autopsy. This provision is substantially similar to its counterpart at 20 C.F.R. § 410.490.[3] It is then apparent that, as far as this method of invocation is concerned, the medical evidence (x-ray, biopsy, or autopsy evidence of pneumoconiosis) necessary under 20 C.F.R. §§ 410.490(b)(1)(i) and 727.203(a)(1) for invoking the presumption of total disability due to pneumoconiosis is identical. It must be concluded, therefore, that, as applied to the facts of this case, Section 727.203(a)(1) is not more restrictive than the criteria applicable to a claim filed on June 30, 1973, and that Subsection (a)(1) of Section 727.203 is consistent with the purpose of the Reform Act.

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the Secretary of HEW promulgated regulations entitled "Interim adjudicatory rules for certain Part B claims filed by a miner before July 1, 1973, or by a survivor where the miner died before January 1, 1974." 20 C.F.R. § 410.490. These rules established standards for determining total disability due to pneumoconiosis that were more lenient than the criteria applicable to claims filed by miners on or after July 1, 1973.

[3] Section 410.490(b) provides, in pertinent part:

> With respect to a miner who files a claim for benefits before July 1, 1973, and with respect to a survivor of a miner who dies before January 1, 1974, when such survivor timely files a claim for benefits, such miner will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of his death, or his death will be presumed to be due to pneumoconiosis, as the case may be, if:
>
> (1) One of the following medical requirements is met:
>
> (i) A chest roentgenogram (x-ray), biopsy, or autopsy establishes the existence of pneumoconiosis . . .

20 C.F.R. § 410.490(b).

The employer, however, specifically disputes the rationality of this regulation. It contends that Section 727.203 (a)(1) establishes a presumption not based upon a proper medical criterion and that there is no rational relationship, medical or otherwise, between an x-ray showing of simple pneumoconiosis and total disability. If this contention were true, the presumption would have to be adjudged unconstitutional under the Supreme Court's standard for testing such presumptions:[4]

> That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be purely arbitrary mandate.

Mobile, J. & K.C.R. Co. v. Turnipseed, 219 U.S. 35, 43 (1910), quoted with approval in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 28 (1976).

Upon examination of the legislative history of the Act, however, it is apparent that Congress had sufficient documentation and testimony before it to mandate the continuation of the Section 410.490 rebuttable presumption of total disability due to pneumoconiosis upon a showing of 10 years of coal mine employment plus x-ray evidence of pneumoconiosis. No absolute correlation between years of coal mine employment and total disability was established. *See* S. Rep. No. 1254, 94th Cong. 2d Sess 7 1976), *reprinted in* the *Legislative History of the Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977* at 342 (1979) (hereinafter, *Legislative*

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[4] A regulatory presumption is judged by the same standard applicable to statutory presumptions. *Atwood's Transport Lines, Inc. v. U.S.*, 211 F. Supp. 168 (D.D.C. 1962), *aff'd* 373 U.S. 377 (1963).

History of the Reform Act). Evidence before Congress did show a strong correlation between years spent in coal mining and the incidence of pneumoconiosis. *See* H.R. Rep. No. 151, 95th Cong. 1st Sess. 28, 29 (1977), *reprinted in* the *Legislative History of the Reform Act* at 537, 538 (1979).

Most of the evidence showed a sharp increase in the prevalence of pneumoconiosis after 15 years in the mines, and there was evidence that some respiratory disease "is likely to begin after as little as one year . . . symptoms get progressively worse with more years spent underground." H.R. Rep. No. 770, 94th Cong., 1st Sess. 71 (1975), *reprinted in* the *Legislative History of the Reform Act* at 183 (1979). One study, based on x-ray evidence, found a progresive increase in the prevalence of pneumoconiosis after 11 years of mining. Id. at 71, *reprinted in* the *Legislative History of the Reform Act* at 183. Based on all the evidence before it, the House reported that 10 years of coal mine employment was the point at which the probability of developing pneumoconiosis began to increase. *Id.* at 71, *reprinted in* the *Legislative History of the Reform Act* at 183. Thus, Congress reasonably found that miners with 10 or more years of coal mine employment very likely will have developed pneumoconiosis.

Further, conclusive evidence before Congress established that x-rays, although not diagnostic of disability, are diagnostic of the existence of pneumoconiosis. Indeed, Congress reached this conclusion, H.R. Rep. No. 460, 92nd Cong., 1st Sess. 9 (1971), and employer concedes this fact. Emp. Brief, p. 3.

Excerpts from the legislative history disclose that Congress determined that a miner who contracted simple pneumoconiosis was sometimes totally disabled due to that disease. The House Report accompanying the 1977 Amendments states:

> Coal workers' pneumoconiosis is caused by the inhalation of coal mine dust. Total disability may arise due to either simple or complicated pneumoconiosis . . .
>
> * * * *
>
> *Simple pneumoconiosis may also be totally disabling,* though the law does not contain a conclusive presumption that a miner is totally disabled if he is so afflicted. Rather, the present test is administratively determined except that a miner is to be deemed totally disabled 'when pneumoconiosis prevents him from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time.'

H. Rep. No. 95-151, 95th Cong., 1st Sess. 3 (1977), *reprinted in U.S. Code Cong. and Admin. News* 1977, p. 239. (Emphasis added.)

Evidence supporting this determination included statements by Dr. Donald Rasmussen and Dr. Lorin Kerr in an article in the *Congressional Record* of November 19, 1971. Dr. Rasmussen stated that he found that many men in West Virginia with "simple, nodular pneumoconiosis . . . were significantly disabled." Dr. Kerr stated that initial x-ray signs are infallible precursors of later disability, although significant ventilatory changes seldom occur before grade 3 simple pneumoconiosis. 117 CONG. REC. 40430 (1971), *reprinted in* Subcommittee on Labor and Public Welfare, 94th Cong., 1st Sess., *Legislative History of the Federal Coal Mine Health and Safety Act of 1969,* at 1805 (1975).

The Surgeon General also testified that "it is generally accepted by physicians that simple pneumoconiosis seldom produces significant ventilation impairment, but *the pinpoint type may reduce the diffusing capacity, the ability to transfer oxygen from the lung into the blood.*"

S. Rep. No. 1254, 94th Cong., 2d Sess. 4 (1976), reprinted in the *Legislative History of the Reform Act* at 34 (1979). (Emphasis added.)

Despite the fact that there was conflicting evidence on the relationship of simple pneumoconiosis to total disability,[5] Congress's conclusion that there is a relationship between simple pneumoconiosis and total disability is supported by the evidence submitted to Congress.

Positive x-ray evidence is diagnostic of simple pneumoconiosis, and such x-rays are likely to accurately reflect the miner's condition after 10 years of coal mine employment. Congress also had evidence before it of a link between simple pneumoconiosis and total disability. We therefore cannot say that there is no rational relationship between the facts proved (x-ray evidence or pneumoconiosis and 10 years of coal mine employment) and the facts presumed (total disability due to pneumoconiosis arising out of coal mine employment). We accordingly find the presumption neither irrational nor "purely arbitrary." *Usery, supra,* at 28.

There is another reason for upholding the presumption. The Supreme Court in *Usery* addressed the constitutionality of Section 411(c)(3) of the Act, 30 U.S.C. § 921(c)(3), which provides an irrebuttable presumption of entitlement to miners with x-ray evidence of complicated pneumoconiosis. The Court refused to strike the Section 411(c)(3) presumption, stating that ". . . in a statute such as this, regulating purely economic matters, we do not think that Congress' choice of statutory

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[5] There was some evidence that disability was not clearly related to simple pneumoconiosis. *See, e.g.,* Black Lung Amendments of 1973: Hearings before the General Subcommittee on Labor of the House Committee on Education and Labor, 93d Cong., 1st and 2d Sess. 199 (1974); Black Lung Benefits Reform Act, 1976: Hearings on H.R. 10760 and S. 3183 before the Subcommittee of Labor of the Senate Committee on Labor and Public Welfare, 94th Cong., 2d Sess. 682 (1976).

language can invalidate the enactment when its operation and effect are clearly permissible." *Usery*, *supra*, at 23-24. (Citations omitted.) The Court concluded "We cannot say that it would be irrational for Congress to conclude that impairment of health alone warrants compensation." *Usery*, *supra*, at 23.

The considerations which swayed the Supreme Court in *Usery* are equally applicable here. There is no doubt that Congress has the authority to pass legislation compensating miners for merely contracting pneumoconiosis, be it simple or complicated. It therefore makes no sense to invalidate a *rebuttable* presumption, such as 20 C.F.R. § 727.203(a)(1), when Congress clearly could lawfully legislate a more far-reaching result than this presumption contemplates, *i.e.*, compensating miners for merely contracting pneumoconiosis rather than being totally disabled by it.

There is yet another reason for upholding the Section 727.203(a)(1) presumption. Congress, in 1972, was concerned about the huge backlog of claims filed under the 1969 Act awaiting adjudication. Congress desired interim evidentiary rules designed to facilitate "prompt and vigorous processing" of these claims. Oversight of the Administration of the Black Lung Program, 1977: Hearings before the Subcommittee on Labor of the Senate Committee on Human Resources, 95th Cong., 1st Sess. 194 (1977). The Social Security interim criteria, 20 C.F.R. § 410.490, were designed to take care of this problem. *Id.* at 194. The same problems and considerations led Congress to require similar standards under the Reform Act of 1977.

Although the concern for administrative efficiency may not be reason in and of itself to declare an exercise of legislative power constitutional, it is a valid consideration in the instant case. The peculiar administrative problems inherent in the adjudication of vast numbers

of black lung claims certainly warrant special procedures. This is yet another consideration which compels the conclusion that Congress did not act arbitrarily, but mandated a rational, constitutional scheme for prompt processing of claims.

The employer next contends that it is unconstitutionally deprived of due process of law because Section 727.203(b) limits the type of evidence it may submit to rebut the interim presumption.

Section 727.203(b) provides that, in adjudicating all claims under Subpart C of Part 727, "all relevant medical evidence shall be considered." 20 C.F.R. § 727.203(b). Four methods of rebuttal are set forth, but there are no restrictions on the types of evidence which may be considered under each method.[6] Thus, nothing in the regulation limits the type of evidence which may be introduced in rebuttal.

The employer was afforded an evidentiary hearing under the Reform Act and its implementing regulations. It was provided ample opportunity to present evidence and to call witnesses to testify on its behalf. The employer has not pointed to any specific type of rebuttal evidence that it wished to adduce at the hearing but was precluded from submitting. To the contrary, there is no indication in the record that the employer was not allowed to submit any evidence it chose. Since employer was not hampered in the presentation of its case, it lacks standing to raise this argument before the Board.

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[6] Section 727.203(b) provides that the Section 727.203(a) presumption shall be rebutted if (1) evidence establishes that the miner is doing his usual work or comparable and gainful work; or (2) the evidence establishes that the miner is able to do his usual work or comparable and gainful work; or (3) the evidence establishes that the total disability or death of the miner did not arise in whole or in part from coal mine employment; or (4) the evidence establishes that the miner does not, or did not, have pneumoconiosis.

U.S. Steel Corp. v. Gray, 588 F.2d 1022, 1026 (5th Cir. 1979).

II

Since the interim presumption of Section 727.203(a)(1) is adjudged constitutional, and since employer concedes it was properly invoked, we must consider whether the administrative law judge erred in finding that the presumption was unrebutted. The employer specifically alleges that any pulmonary disability of the miner is slight and does not prevent him from performing his usual coal mine duties. The employer also contends that claimant's total disability is not due to dust exposure. Since the miner in the instant case is not employed and the employer conceded that the miner has clinical pneumoconiosis, only 20 C.F.R. §§ 727.203(b)(2) and (b)(3) are applicable. *See fn.* 6, *supra.*

The administrative law judge did not specifically discuss each of the methods of rebuttal. His rationale for finding the presumption unrebutted was as follows:

> The medical report (Operator's Exhibit 4), signed by Ralph J. Jones, M.D., and W. G. Hayes, M.D., who examined Claimant on October 13, 1975, found 'disability due to non-pulmonary conditions'; and 'occupational pneumoconiosis with a slight degree of impairment of capacity for work thereon.' Although there is additional evidence, including Claimant's own testimony, that his back condition, as well as a pulmonary embolus and a bout with pneumonia, have contributed, or may in fact be the more significant impairments, there is nothing in the record to controvert the finding that Claimant is totally disabled; and that his pneumoconiosis has contributed *at least in part* to this disability. The interim presumption therefore remains unrebutted, and the application of this presumption qualifies Claimant for benefits under the Act.
>
> *Decision and Order*, p. 6. (Emphasis added.)

The administrative law judge appears to have interpreted rebuttal under Section 727.203(b) to be impossible where pneumoconiosis is only partially the cause of existing disability. We believe this reasoning stems from the language of Section 727.203(b)(3), which provides for rebuttal if it is established that the "total disability or death of the miner did not arise *in whole or in part* out of coal mine employment . . . ." 20 C.F.R. § 727.203(b)(3) (emphasis added). We further believe that Section 727.203(b)(3), insofar as it permits awards for disability caused only *in part* by diseases arising out of coal mine employment, is inconsistent with the Act and therefore invalid. Accordingly, the administrative law judge erred in his rebuttal analysis, an error which necessitates remand. My colleague, Judge Smith, concurs with this judgment.

From the inception of the black lung legislation in 1969, it has been Congress's declared purpose to compensate

> coal miners who are totally disabled due to pneumoconiosis and . . . the surviving dependents of miners whose death was due to such disease or who were totally disabled by this disease at the time of their death . . .

30 U.S.C. § 901(a). This purpose has remained unchanged throughout the administration of the black lung program,[7] and is reflected in prior regulations. *See* 20 C.F.R. §§ 410.412, 410.426.

Despite this, and without such a departure being authorized by statute, the Secretary of Labor has for the

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[7] The one exception is Section 411(c)(5), 30 U.S.C. § 921(c)(5), added to the Act in 1977. This provision provides a presumption of entitlement to certain miners' survivors which is rebutted only by showing that the deceased miner was not totally or partially disabled due to pneumoconiosis. This exception does not, however, alter the validity of our point in the instant case, since Section 411(c)(5), applies only to a narrow class of survivors.

first time promulgated a regulation which, when interpreted as did the administrative law judge in this case, permits awards of black lung benefits to claimants who are only *partially disabled* due to pneumoconiosis.

This is not in keeping with the Act, which requires that *total* disability be due to pneumoconiosis. 30 U.S.C. §§ 901(a), 902(f)(1). Permanent regulations promulgated under the Act have, until this point, always required that pneumoconiosis (clinical or presumptive), in and of itself, be totally disabling. *See* 20 C.F.R. §§ 410.412, 410.422 and 410.424.

Pneumoconiosis, by definition, is "a chronic dust disease of the lung . . . arising out of coal mine employment." 30 U.S.C. § 902(b). Section 727.203(b)(3) as written, however, permits the presumption to stand if only *part* of the disability arose out of coal mine employment, *i.e.*, only *part* of the disability need be due to pneumoconiosis. This would permit awards of benefits to claimants not *totally* disabled by pneumoconiosis in and of itself. Besides being inconsistent with the Act, this regulation's phraseology places upon employer a nearly impossible burden of proof in cases, such as the instant one, where pneumoconiosis is diagnosed. Under Section 727.203(b)(3), as written, the employer must show that *no part* of the total disability arose out of coal mine employment.

We think this is unjust to employer in that it exceeds the mandates of the Act. Consequently, we hold that, in order to rebut this presumption, an employer must show that the pneumoconiosis from which the miner suffers, be it true or presumed, is not in and of itself totally disabling. This is all the Act requires, and to the extent that 20 C.F.R. § 727.203(b)(3) departs from that requirement it is inconsistent with the Act.

Accordingly, Section 727.203(b)(3) should be read in future as though the words "in whole or in part" were

not part thereof, *i.e.*, the presumption is rebutted under Section 727.203(b)(3) if it is shown that total disability or death did not arise out of coal mine employment.

In the instant case, there is evidence which is relevant to rebuttal under both Sections 727.203(b)(2) and (3). This evidence includes three pulmonary function studies, one of which was termed normal by the interpreting physician (relevant to rebuttal pursuant to Section 727.203(b)(2)); *see Sykes v. Itmann Coal Co.*, 2 BLR 1-1089 (1980); Dr. Salon's December 1974 report diagnosing hypertension and probable coal workers' pneumoconiosis, and linking those conditions to coal mine employment (relevant to rebuttal pursuant to Section 727.203(b)(3)); and the October 1975 report of Drs. Hayes and Jones, in which the doctors diagnosed occupational pneumoconiosis with a slight impairment in work capacity and disability due to a non-pulmonary condition (probably a back problem) (relevant to rebuttal pursuant to Sections 727.203(b)(2) and (3)).

In light of our holding regarding rebuttal under Section 727.203(b)(3), we must remand this case for the administrative law judge to reconsider all the relevant evidence, especially that mentioned *supra*, under Sections 727.203(b)(2) and (3).

III

The employer next argues that the administrative law judge erred in awarding benefits to commence with the onset of disability in September 1974. Benefits should commence, employer contends, only with the enactment of the Reform Act on March 1, 1978.

We reject employer's arguments. The Reform Act clearly states that all claims which are pending or denied prior to the date of its enactment are to be reviewed under the new Reform Act criteria. 30 U.S.C. § 945; 20 C.F.R. §§ 727.101 and 727.102 (1979). The Act further provides that benefits may be awarded pursuant to

those claims as far back as January 1, 1974. 30 U.S.C. § 945(c).

The Supreme Court in *Usery*, *supra*, stated that statutes such as the one with which we are dealing are presumed constitutional. It is the employer's burden to establish that Congress acted in an arbitrary and irrational way. *Usery*, *supra*, at 15. The employer in the instant case has not met this burden, especially in view of the Court's rejection of a more serious due process retroactivity argument in *Usery*. *See Usery*, *supra*, at 16-20.

IV

We last address employer's argument that the administrative law judge erred in finding the claimant's stepdaughter, Evelyn, to be his dependent for purposes of augmented benefits under the Act. We reject this contention.

A record from the West Virginia Department of Vocational Rehabilitation indicates that in 1968 Evelyn was living with her mother and stepfather. Evelyn has a low I.Q., scoring 69, 75 and 67 on the various tests given her. She was unable to complete a vocational rehabilitation program successfully. The claimant testified that Evelyn had been diagnosed as mentally retarded in the fifth grade, and that she was considered as his disabled child for Social Security purposes. This last fact alone is enough to qualify Evelyn as the claimant's dependent for purposes of the Act. 30 U.S.C. §§ 902(g)(B)(i) and (ii).

Employer introduced no evidence to controvert the facts recited *supra*. Accordingly, we hereby affirm the administrative law judge's finding that Evelyn is the dependent of her stepfather, the claimant.

Accordingly, the Decision and Order is affirmed in part and vacated in part, and the case is remanded to the Office of Administrative Law Judges for reconsideration

of the question of rebuttal under 20 C.F.R. §§ 727.203 (b)(2) and (3). Should the presumption be found rebutted on remand, the administrative law judge must then proceed to consider the claimant's entitlement under the permanent criteria.

SO ORDERED.

MILLER, Administrative Appeals Judge, concurring:

I fully concur in the conclusion that the Section 727.203 (a) (1) presumption is constitutional. Since my own interpretation of Section 727.203 (a) (1) differs somewhat from that of Judge Kalaris, I must state my views separately.

For the reasons expressed in Part I of the opinion of Judge Kalaris, I agree that there is a rational relationship between the facts proved (x-ray evidence of pneumoconiosis and 10 years of coal mine employment) and the facts presumed (total disability due to pneumoconiosis arising out of coal mine employment).

However, it is my view that Section 402 (f) (2) of the Act, 30 U.S.C. § 902 (f) (2), requires that Section 727.203 (a) (1) must be interpreted to provide access to the interim presumption even to those miners with less than 10 years of coal mine employment when it can be established that their pneumoconiosis arose out of coal mine employment. *See* my dissenting opinion in *Lynn v. Director*, —— BLR ——, BRB No. 80-257 BLA (May 11, 1981). *See also* 20 C.F.R. §§ 410.490 (b) (1) (i) and (b) (2). Under these circumstances, the fact proved is x-ray evidence of pneumoconiosis and the fact presumed is total disability due to pneumoconiosis. My analysis indicates that Congress could, and did, conclude that there exists a rational relationship between x-ray evidence of pneumoconiosis and total disability due to pneumoconiosis, irrespective of 10 years of coal mine employment.

The Reform Act was motivated by Congressional dissatisfaction with misapprehension of the intent of the Act as enacted in 1969.

> The Black Lung Benefits Act of 1972 amended the basic law in several important respects; *generally broadening claimant eligibility* . . . . With respect to the changes broadening claimant eligibility, *it should be noted that the Committee initiated the 1972*

> *amendments in large part because of dissatisfaction with* the administration of the law by the Department of Health, Education, and Welfare (Social Security Administration), *which in some respects, clearly contravened discernible legislative guidelines.* The amendments proposed by H.R. 4544 rest on a comprehensive analysis of the program since its inception. *They are remedial in nature—in several instances again redefining misapprehended legislative intent. . . .* (*Emphasis added.*)

H.R. Rep. No. 151, 95th Cong., 1st Sess. 4 (1977), *reprinted in* 2 *U.S. Code Cong. and Admin. News* at 240 (1978).

There was already evidence before Congress in 1969 that miners with any degree of pneumoconiosis were not able to perform their usual coal mine employment. Congress was aware of the following remarks of the Surgeon General:

> Pneumoconiosis is a pathological condition of the lung induced by inhalation of small particles.
>
> There are many types of pneumoconiosis caused by specific kinds of dusty materials, as, for example, silica and cotton fibers. Coal miners' pneumoconiosis is a chronic chest disease, caused by the accumulation of fine coal dust particles in the human lung. In its advances [sic] forms, it leads to severe disability and premature death.
>
> Coal miners' pneumoconiosis was recognized, in Great Britain as early as 1943, as a disease entity separate from silicosis. It was not generally recognized as such in the United States until the 1950's. Prevalence studies by the Pennsylvania Department of Health (1959-61) and by the Public Health Service (1963-65) confirmed the existence of the disease entity, documented its prevalence among coal miners, and showed that it is a widespread problem.

Coal miners' pneumoconiosis is a distinct clinical entity, resulting from inhalation of coal dust. Physicians diagnose it on the basis of X-ray evidence of nodules in the lungs of a patient with a history of long exposure to coal dust. However, it should be pointed out that data from postmortem examinations indicate a higher prevalence of the disease than can be diagnosed from X-ray examinations.

Physicians classify coal miners' pneumoconiosis as simple or complicated, depending on the degree of evidence in the X-ray picture. In the simple form, pinpoint, micronodular or nodular lesions distributed throughout the lungs show up in the X-ray picture.

The physician decides the radiological category of simple pneumoconiosis on the basis of the extent of the opacities. There are no specific symptoms, and pulmonary function tests seldom enable the physician to say whether or not the patient has the disease. It is generally accepted by physicians that simple pneumoconiosis seldom produced significant ventilatory impairment, but, the pinpoint type may reduce the diffusing capacity, the ability to transfer oxygen into the blood.

Complicated pneumoconiosis is a more serious disease. The patient incurs progressive massive fibrosis as a complex reaction to dust and other factors, which may include tuberculosis and other infections. The disease in this form usually produced marked pulmonary impairment and considerable respiratory disability.

Such respiratory disability severely limits the physical capabilities of the individual, can induce death by cardiac failure, and may contribute to other causes of death.

Medical researchers in both Britain and the United States have repeatedly shown that coal miners suffer

> from more respiratory impairment and respiratory disability than does the general population. These respiratory problems are frequently accentuated by chronic bronchitis and emphysema, the causative factors of which remain to be clarified.
>
> *There is no specific therapy for pneumoconiosis in either its simple or complicated form. Adequate environmental dust controls, use of respirators, or removing the miners from the dusty environment as soon as they show minimal effects appear to be, under present technology, the only helpful preventive procedures.* (Emphasis added.)

H.R. Rep. No. 563, 91st Cong., 1st Sess., at 15-16 (1969); *see also* S. Rep. No. 411, 91st Cong., 1st Sess., at 7-8 (1969). It is not disputed that the effects of both simple and complicated pneumoconiosis are irreversible. *See, e.g., Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7 (1976). Moreover, all stages of pneumoconiosis are progressive when there is continued exposure to coal dust. *Id.*; *Crofton and Douglas, Respiratory Diseases*, 512 (2d ed. 1975).

With this background in mind, it is important to note that the term "total disability" under the Act encompasses the inability to engage in usual coal mine work or comparable and gainful work. *See* 20 C.F.R. § 410.412.

In light of the following factors presented to Congress:

(1) The existence of pneumoconiosis can be diagnosed (and, in fact, is underestimated) by x-ray evidence.

(2) The deleterious effects of pneumoconiosis are irreversible and progressive upon further exposure to coal dust.

(3) There is no specific therapy for pneumoconiosis.

(4) The only helpful preventive procedures are adequate environmental dust controls, use of respirators, or removal of the miners from the dusty environment as soon as they show minimal effects of pneumoconiosis.

I conclude that it was eminently reasonable for Congress to determine that the diagnosis of a disease, which upon further exposure to coal dust may irreversibly progress to produce severe impairment or death, does bear a rational relationship to the inability to work in a dusty environment, *i.e.*, coal mine employment. Furthermore, by its mandate in Section 402(f)(2) of the Act, 30 U.S.C. § 902(f)(2), Congress did so conclude, even with regard to miners having less than 10 years of coal mine employment, when their pneumoconiosis arose out of such employment. *See* my dissenting opinion in *Lynn*, *supra*. As the Supreme Court noted in *Usery*, "We cannot say that it would be irrational for Congress to conclude that impairment of health alone warrants compensation." 428 U.S. at 23.

In the context of Section 727.203(a)(1), the Department of Labor did not choose to compensate for impairment of health alone, but rather to compensate for the disease pneumoconiosis, as diagnosed by x-ray evidence, unless, for example, the rationally presumed inability to work in a dusty atmosphere does not leave the miner totally disabled. That is, unless it is established that the miner is doing, or is capable of doing, his usual coal mine work or comparable and gainful work. *See* 20 C.F.R. §§ 727.203(b)(1) and (2). The employer can thus rebut the interim presumption by establishing that the miner is doing, or is capable of doing, his usual coal mine work as in showing that the miner is doing, or is able to do, coal mine employment which, by the use of respirators or adequate environmental dust controls, does not involve medically contraindicated dust exposure. Similarly, the

employer can rebut the interim presumption by establishing that the miner is doing, or is capable of doing, comparable and gainful work.[1]

Since Congress mandated that the Department of Labor promulgate 20 C.F.R. Part 727 so as to be no more restrictive than the criteria applicable to a claim filed on June 30, 1973, the presumption of 20 C.F.R. § 727.203, to the extent that it is not more restrictive than the criteria of 20 C.F.R. § 410.490, does effectuate the Congressional mandate. *See* Section 402(f)(2), 30 U.S.C. § 902(f)(2). That mandate is based on the rational conclusion that the existence of pneumoconiosis as diagnosed by x-ray evidence bears a relationship to the inability to work in a dusty environment. Finally, Congress could choose to compensate for that inability, or perhaps, for the impairment of health alone. *Usery*, 428 U.S. at 23.

Since there was evidence before Congress that the diagnosis of pneumoconiosis by x-ray did indicate the inability to work in a dusty environment, the presumption of Section 727.203(a)(1) is constitutional. *Usery, supra.* Entitlement based on the Section 727.203(a)(1) presumption would be constitutionally unassailable even if the presumption were irrebuttable had Congress so mandated. The party opposing entitlement cannot reasonably object to the Department of Labor's provision of rebuttal means for the presumption, thus limiting compensation to a less pervasive scope than could be reached by the Congress.

I further concur that this case must be remanded to the administrative law judge. However, I do not agree

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[1] This Board has held that once a miner is unable to do his usual coal mine work (as is presumed from the proven fact in Section 727.203(a)(1)) the burden of establishing that the miner is not totally disabled by reason of the ability to do comparable and gainful work must be borne by the employer. *See Fletcher v. Central Appalachian Coal Co.*, 1 BLR 1-980 (1978); *Sturnick v. Consolidation Coal Co.*, 2 BLR 1-973 (1980).

with the rationale of my colleagues. Rather, I would hold that the administrative law judge's sole error was in failing to determine whether, ignoring *non-respiratory and non-pulmonary* conditions, claimant was totally disabled. *See* 20 C.F.R. § 727.202. This error does require remand for further consideration of rebuttal pursuant to Section 727.203(b)(3), but in no way places into issue the validity of Section 727.203(b)(3). Therefore, while noting that Subsection (b)(3) does appear consistent with the Act, I would address the validity of this regulation in an appropriate case where the underlying definitions of Section 727.202 are properly applied.

In other respects, I concur in the opinion of Judge Kalaris.

SMITH, Chief Administrative Appeals Judge, concurring in part and dissenting in part:

This appeal presents an important issue of first impression that challenges the constitutionality of the Section 727.203(a)(1) interim presumption, which is contained in the Secretary of Labor's interim regulations implementing the Black Lung Benefits Reform Act of 1977. 20 C.F.R. § 727.203. The Black Lung Benefits Reform Act of 1977 made substantial changes to various provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (hereinafter, the Act).

I cannot concur with the majority's conclusion that the 20 C.F.R. § 727.203(a)(1) interim presumption is constitutionally valid since in my view the Section 727.203 (a)(1) presumption does not meet the review standard set by the Supreme Court for such presumptions. The proper standard for reviewing the constitutionality of Section 727.203(a)(1) is whether there is "some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 28 (1976), *citing Mobile, Jackson & Kansas City Rail Co. v. Turnipseed*, 219 U.S. 35, 43 (1910).[1]

In making that determination of rationality, "significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it." *Id. citing United States v. Gainey*, 380 U.S. 63, 67 (1965). When the Supreme Court, in *Turner Elkhorn*, held a rational basis existed for the legislative presumptions in Sections 411(c)(1), (2), (3), and (4)

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[1] The validity of a regulatory presumption is to be determined by the standard applicable to statutory presumptions. *Atwood's Transport Lines, Inc. v. United States*, 211 F. Supp. 168 (D.D.C. 1962), *aff'd* 373 U.S. 377 (1963).

of the Act, 30 U.S.C. §§ 921(c)(1), (2), (3) and (4), it did so after determining that the legislative record contained specific medical, scientific, or other testimony to support each presumption, *see id.* at 29-34.

Therefore, for us to uphold Section 727.203(a)(1) the legislative record must demonstrate a rational connection between the presumption of total disability and either evidence of 10 years of coal mine employment or a chest x-ray showing simple pneumoconiosis. After extensive examination of the legislative record, I cannot conclude, as does the majority, that the testimony, medical reports, or other documentation before Congress establish a rational basis for the presumption of total disability contained in Section 727.203(a)(1).[2]

The presumption of total disability cannot rest upon evidence that a claimant had 10 years of coal mine employment because the evidence before Congress fails to establish any correlation between years of coal mine employment and the development of total disability due to pneumoconiosis.

At best the evidence presented to Congress indicates that it takes 10 to 15 years of underground mining for coal miners even to begin to develop coal workers' pneumoconiosis.[3] Black Lung Benefits Reform Act, 1976, Hearings before the Senate Committee on Labor and Public Welfare, 94th Cong., 2d Sess. 681 (1976) (Report

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[2] My objection to Section 727.203(a)(1) extends only to that part of the regulation which presumes total disability from x-ray evidence of pneumoconiosis and 10 years of coal mine employment. That portion of Section 727.203(a)(1) which presumes that death is due to pneumoconiosis meets the standard of rationality in *Turner Elkhorn*. *See, infra* at 28-29.

[3] In fact, the report submitted by the National Academy of Sciences to the Senate Subcommittee on Labor found that ". . . the occurrence of the disease after only eight to ten years of underground exposure is exceptional." Hearings: Reform Act at 681, 1976.

to the National Academy of Sciences) (hereinafter, Hearings: Reform Act, 1976).

The National Coal Workers' Autopsy study at the Appalachian Laboratory for Occupational Respiratory Disease found that the percentage of cases of pneumoconiosis begins to increase sharply after a miner has worked 15 years in the mines, H.R. Rep. No. 770, 94th Cong., 1st Sess. 71 (1975) *reprinted in* the *Legislative History of the Reform Act* at 184 (1979), a finding which parallels the conclusion of the Surgeon General's Report to Congress that the occurrence of pneumoconiosis is spotty for work periods of less than 15 years.[4] S. Rep. No. 743, 92nd Cong., 2d Sess. at 13 (1972).

In *Turner Elkhorn*, this evidence, that the incidence of pneumoconiosis increases in cases of miners with 10 years of coal mine employment, was held sufficient to establish a rational basis for the presumptions in Sections 411(c)(1) and (2) of the Act. *See* 428 U.S., *supra* at 29. However, as the Supreme Court cautioned:

> It is worth repeating that mine employment for 10 years does not serve by itself to activate any presumption of pneumoconiosis; it simply serves along with proof of pneumoconiosis under § 411(c)(1) to presumptively establish the cause of pneumoconiosis, and along with proof of death from a respirable disease under § 411(c)(2) to presumptively establish that death was due to pneumoconiosis.

428 U.S. at 29.

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[4] The lowest figure in fact advocated as an objective measure for determining eligibility for benefits was 15 years. H.R. Rep. No. 770, 94th Cong., 1st Sess. at 72 (1975). Otherwise, the figures cited as the point at which coal miners should be entitled to benefits ranged from 25 to 30 years of coal mine employment. H.R. Rep. No. 770, 94th Cong., 1st Sess. at 6 (1975); Black Lung Benefits Reform Act of 1976, Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 94th Cong., 2d Sess. at 143 (1976).

Therefore, while the Supreme Court found Sections 411 (c) (1) and (2) to be constitutionally valid, it did so because duration of employment was used to establish causality. The basis of my objection to Section 727.203 (a) (1) is not the use of 10 years to establish causation, which the presumption does, but the use of duration of employment to go one step further and establish total disability.

Therefore, while this evidence indicates that the prevalence of pneumoconiosis may increase after 10 to 15 years of coal mine employment and supports a presumption of causality as in *Turner Elkhorn*, nowhere does the evidence in the legislative record establish a relationship between years of employment and disability. As the report of the Senate Committee on Labor and Public Welfare concluded, after review of the evidence before it, "there is no clear causal relationship between duration of employment and the incidence of total disability due to pneumoconiosis." S. Rep. No. 209, 95th Cong., 1st Sess. at 17 (1977), *reprinted in* the *Legislative History of the Reform Act* at 620 (1979). I, therefore, cannot conclude that a rational connection exists between 10 years of coal mine employment and the presumption of total disability.

I also cannot find evidence in the legislative record to establish a rational connection between an x-ray showing simple pneumoconiosis and the Section 727.203 (a) (1) presumption of total disability. The testimony before Congress demonstrates that the chest roentgenogram is merely a tool to identify the existence of pneumoconiosis; it does not measure the functional capacity of a miner.

Dr. Lorin Kerr, Medical Director, Department of Occupational Health, United Mine Workers of America, in hearings before the Senate Subcommittee on Labor specifically stated that an x-ray "should never be used to determine the presence or severity of respiratory disabil-

ity." Hearings to amend Title IV of the Federal Coal Mine Health and Safety Act of 1969 before the Subcommittee on Labor of the Senate Subcommittee on Labor and Public Welfare, 92nd Cong., 1st and 2d Sess. at 42 (1972).

Dr. Donald L. Rasmussen, an acknowledged expert in the field of pulmonary testing,[5] likewise testified before the House Subcommittee on Labor that ". . . impairment in function is unrelated to x-ray findings."[6] Hearings to amend Title IV of the Federal Coal Mine Health and Safety Act of 1969 before the General Subcommittee on Labor of the House Committee on Education and Labor, 92d Cong., 1st Sess. 101 (1971). A similar conclusion was reached in a report submitted by the National Academy of Sciences that "the chest x-ray is not a useful means of assessing the functional status of the lung nor of determining disability." Hearings: Reform Act at 681, 1976.

As there is no correlation between an x-ray identification of pneumoconiosis and disability, Dr. Bedford Bird, former Deputy Director, Department of Occupational Health, United Mine Workers of America, testified that other tests are absolutely necessary to determine the extent of pulmonary impairment. Hearings before the Subcommittee on Labor of the Senate Committee on Human Resources, 95th Cong., 1st Sess. at 36 (1977). This testimony demonstrates that there is no medical basis on which to presume total disability from an x-ray showing of simple pneumoconiosis.

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[5] *See Morris v. Mathews*, 557 F.2d 563, 569 (6th Cir. 1977); *Davis v. Califano*, 473 F. Supp. 941, 745 (S.D. W.Va. 1979).

[6] In conjunction with his testimony, Dr. Rasmussen submitted a study which concluded the x-ray is of little value in evaluating functional capacity. Hearings before the General Subcommittee on Labor of the House Committee on Education and Labor, 92d Cong., 1st Sess. at 161 (1971).

In face of the overwhelming evidence in the legislative record that there is no medical basis for presuming total disability based upon 10 years of coal mine employment and an x-ray showing of simple pneumoconiosis, I cannot conclude that there is a rational basis for the Section 727.203(a)(1) interim presumption. The majority, however, finds sufficient evidence before Congress to link total disability in a miner with simple pneumoconiosis established by x-ray alone, and thus uphold the constitutionality of Section 727.203(a)(1). Again, I cannot agree.

While the testimony relied upon by the majority suggests that simple pneumoconiosis may cause some functional impairment in a miner, *see* 117 CONG. REC. 40430 (1971), *reprinted in* the *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, 94th Cong., 1st Sess. at 1805 (1975), it does not demonstrate that simple pneumoconiosis diagnosed by x-ray is, or can be, totally disabling. It must be remembered that except for Section 411(c)(5) of the Act, 30 U.S.C. § 921(c)(5), benefits are payable *only* if pneumoconiosis causes *total disability*. I, therefore, cannot conclude that this evidence provides a rational basis for Section 727.203(a)(1) which contains a presumption of *total, not partial, disability*.

The medical testimony before Congress, in fact, demonstrates that disability is not clearly linked to simple pneumoconiosis.[7] The Surgeon General testified that "simple pneumoconiosis seldom produces significant ventilation impairment . . ." S. Rep. No. 1254, 94th Cong., 2d Sess. 4 (1976), *reprinted in* the *Legislative History of the Reform Act* at 34 (1979).

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[7] The Supreme Court in *Turner Elkhorn* also recognized that "[s]imple pneumoconiosis . . . is generally regarded by physicians as seldom productive of significant ventilatory impairment." 428 U.S. at 7.

Dr. Harvey Phelps also testified that "disability as measured by the prevalence of symptoms, recurrent chest illnesses or levels of ventilatory function, is not closely related to the degree of simple coal workers' pneumoconiosis nor to life time dust exposure." Hearings before the General Subcommittee on Labor of the House Committee on Education and Labor, 92d Cong., 1st and 2d Sess. at 199 (1974). These conclusions parallel the findings of a study completed for the National Academy of Sciences that simple coal workers' pneumoconiosis may cause functional impairments but that these impairments do not result in a coal worker's disability. Hearings: Reform Act at 681, 1976.

Even the testimony of Dr. Lorin Kerr, cited by the majority, indicates that *significant ventilatory changes* seldom occur before grade 3 simple pneumoconiosis.[a] 117 CONG. REC. 40430 (1971), *reprinted in Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, 94th Cong., 1st Sess. at 1805 (1975).

Perhaps no more persuasive evidence exists, however, than the acknowledgment by the Social Security Administration before the Senate Subcommittee on Labor that the 20 C.F.R. § 410.490 interim criteria, which the Section 727.203 regulations track, were not necessarily drafted to describe a level of impairment which would impose a functional limitation on the individual. Oversight Hearings of the Administration of the Black Lung

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[a] Simple pneumoconiosis is classified into categories 1, 2, and 3 according to the profusion of small opacities in the lung fields. The radiographic classification of grade 3 simple pneumoconiosis would be 3/3. *See* Morgan and Lapp, "Respiratory Disease in Coal Miner," 113 *American Review of Respiratory Disease*, 535 (1976). In this case, the effect of Section 727.203(a)(1) is to grant a presumption of total disability to a claimant whose radiographic (x-ray) reports vary from 0/0 to 2/2. There is no evidence in the legislative record which demonstrates that such simple pneumoconiosis diagnosed by x-ray causes functional impairments in a miner resulting in total disability.

Program before the Subcommittee on Labor of the Senate Committee on Human Resources, 95th Cong., 1st Sess. at 194 (1977) (statement of Dr. Herbert Blumenfeld). According to the Social Security Administration, the criteria were designed only to detect the presence of simple coal workers' pneumoconiosis. The purpose of the criteria was to clear away the backlog of cases under the 1972 amendments and to meet Congressional pressure for greater administrative efficiency. *See* S. Rep. No. 1254, 94th Cong., 2d Sess. at 10 (1976). The constitutionality of the Section 410.490 interim criteria was never challenged.

In light of the above evidence, it is clear that the Section 727.203(a)(1) interim presumption does not meet the constitutional requirement that a rational connection exist between the fact proved and the fact presumed. The presumption of total disability cannot be based on a showing of 10 years coal mine employment. The statistics before Congress indicate that pneumoconiosis is more prevalent among miners who have spent a substantial number of years underground. However, no correlation ever was established between 10 years of coal mine employment and the total disability of a miner.

Similarly, the presumption of total disability cannot be based on x-ray evidence of pneumoconiosis. As the testimony and reports emphasized, the x-ray is only a tool to identify the existence of pneumoconiosis. It does not measure a miner's disability. The Social Security Administration's acknowledgment that the 20 C.F.R. § 410.490 criteria were designed to detect the presence of pneumoconiosis, rather than to measure disability, further indicates that there is no medical basis for presuming total disability from an x-ray positive for simple pneumoconiosis.

The evidence in the legislative record on the disabling effects of simple pneumoconiosis provides us with the only potential basis for sustaining the Section 727.203

(a)(1) interim presumption. The evidence favorable to the presumption, however, suggests only that *simple pneumoconiosis can cause some functional impairment, particularly in its later stages, not that simple pneumoconiosis is totally disabling.* The testimony before Congress, therefore, does not provide a rational basis for the Section 727.203(a)(1) interim presumption. Left with no evidence upon which to hold the Section 727.203 (a)(1) presumption constitutional, I would find that it effects a denial of due process to the employer in this case.

Assuming arguendo that Section 727.203(a)(1) is constitutional, I concur with Judge Kalaris' determination that the "in part" language of Section 727.203(b) is inconsistent with the intent and purpose of the Reform Act. Since it allows entitlement to benefits on a showing of less than total disability, it must be invalidated.

Dated this 10th
day of June 1981

(3)

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No. 84-1344

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SAGINAW MINING COMPANY,
Petitioner,

v.

LEWIS GIBAS,
Claimant-Respondent,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

and

THE BENEFITS REVIEW BOARD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION

IRWIN W. BARKAN, ESQ.
DANIEL L. MANRING, ESQ.
(Counsel of Record)
BARKAN & NEFF CO., L.P.A.
50 W. Broad St., P.O. Box 1969
Columbus, Ohio, 43216
Telephone: (614) 221-4221
Counsel for Claimant-Respondent Lewis Gibas

March 22, 1985

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THE QUESTION PRESENTED

WHETHER, IN A CLAIM FOR BLACK LUNG DISABILITY BENEFITS, THE REGULATION LIMITING THE METHOD OF REBUTTAL OF THE STATUTORY PRESUMPTION OF TOTAL DISABILITY IS WITHIN THE SECRETARY'S BROAD RULEMAKING AUTHORITY AND IS CONSISTENT WITH THE REMEDIAL PURPOSE OF THE BLACK LUNG ACT.

PARTIES TO THE PROCEEDINGS

This case involves adjudications of claims filed under the Federal Black Lung Act. The claimant-respondent is Lewis Gibas, Route 1, St. Clairsville, Ohio, a former employee of Petitioner. The U.S. Department of Labor, Employment Standards Administration, Office of Workers' Compensation Programs, 200 Constitution Ave, N.W., Washington, D.C., 20210 is also a Respondent. See 20 C.F.R. § 802.411(b). The Benefits Review Board, U.S. Department of Labor, 111 20th St., N.W., Suite 757, Vanguard Bldg., Washington, D.C. 20036, is a Respondent in name only. Rule 15(e), F. R. App P. Petitioner is the Saginaw Mining Company, P.O. Box 275, St. Clairsville, Ohio. Petitioner is a wholly owned subsidiary of the Oglebay Norton Company, 1100 Superior Avenue, Cleveland, Ohio.

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IN THE

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No. 84-1344

SAGINAW MINING COMPANY,
Petitioner,

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LEWIS GIBAS,
Claimant-Respondent,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

and

THE BENEFITS REVIEW BOARD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION

The claimant-Respondent respectfully submits his Brief in Opposition to the writ of certiorari requesting review of the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 26, 1984.

OPINIONS BELOW

Under the federal statutes and regulations, "Black Lung" claims are first heard by an Administrative Law Judge (ALJ) of the Department of Labor. An "on the record" appeal lies to the Benefits Review Board (the

Board), and then to the United States Court of Appeals. 33 U.S.C. §§ 921(b) and (c).

The opinion of the ALJ in this case is not reported. A copy is in the Petitioner's Appendix, at 31a-37a. The Board's opinion is reported at 6 Black Lung Reporter (BLR) 1-18 (1983). A copy of it is at App. 19a-30a. The Court of Appeals decision is reported at 748 F.2d 1112 (Nov. 26, 1984). A copy of the decision appears at App. 1a-16a. The judgment is at App. 17a-18a.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are set forth in the Appendix to Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

STATEMENT OF THE CASE

Claimant-Respondent, Lewis Gibas, is a former employee of Petitioner, the Saginaw Mining Company. Mr. Gibas alleges approximately thirty-four (34) years of coal mine employment and the employer concedes to twenty-four (24). During his working years, Mr. Gibas engaged in heavy labor and was exposed to very dusty conditions. Mr. Gibas was forced to discontinue his employment due to breathlessness, chest pain, and a chronic cough.

Claimant filed an application for benefits under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 901, et seq., as amended. Following a hearing held before an administrative law judge, claimant was found entitled to Black Lung disability benefits (Petitioner's Appendix to writ of certiorari 31a-37a). The administrative law judge ruled that claimant was entitled to the interim presumption of total disability due to pneumoconiosis under 20 C.F.R. § 727.203(a)(1) and (2). The administrative law judge based his decision on

positive x-ray evidence of pneumoconiosis, pulmonary function studies demonstrating a disabling respiratory impairment, and claimant's testimony. After carefully reviewing all the relevant evidence of record, the administrative law judge concluded that the employer had failed to establish rebuttal of the interim presumption by any of the four methods set forth at 20 C.F.R. § 727.-203(b). The rebuttal evidence, consisting of a medical report and deposition submitted by Dr. George Kress, was found to be insufficient by the administrative law judge to overcome the presumption.

Upon appeal to the Benefits Review Board, the Board reversed the ALJ's award of benefits. The Board invalidated the "in whole or in part" language of the rebuttal provision at 20 C.F.R. § 727.203(b)(3) and proceeded to reweigh the rebuttal evidence. After invalidating the regulation, the Board ruled that the employer had established rebuttal of the interim presumption.

Upon further appeal,, the Court of Appeals reversed the decision of the Benefits Review Board and remanded the case to the Board with instructions that benefits be awarded. The Court of Appeals held that the "in whole or in part" language of the rebuttal provision is consistent with the statute and represented a regulation within the rulemaking authority of the Secretary of Labor.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS PROPERLY FOUND THE "IN WHOLE OR IN PART" LANGUAGE OF 20 C.F.R. § 727.203(b)(3) TO BE CONSISTENT WITH THE BROAD REMEDIAL PURPOSE OF THE BLACK LUNG ACT AND WITHIN THE RULEMAKING AUTHORITY OF THE SECRETARY OF LABOR AS CONFERRED BY CONGRESS.

The Black Lung Act provides for the payment of benefits to coal miners who are totally disabled due to pneumoconiosis (black lung disease). 30 U.S.C. § 901, 902,

921 and 931. In 1977, the Black Lung Benefits Reform Act was passed, and the Secretary of Labor was expressly delegated the authority to define and establish criteria for determining what constitutes "total disability." 30 U.S.C. § 902(f). Pursuant to this delegation, the Secretary promulgated the "Interim Presumption" setting forth various medical standards which, if met by the claimant, trigger a *presumption* of total disability due to pneumoconiosis. 20 C.F.R. Part 727, § 203(a). If the claimant is found to be entitled to the invocation of the interim presumption, and thus entitled to the presumption of total disability due to pneumoconiosis, benefits are payable unless the employer establishes rebuttal of the presumption as provided by 20 C.F.R. § 727.203 (b).[1]

The employer contends that the method of rebuttal under § 727.203(b)(3), represents a deviation from the authority conferred upon the Secretary by the enabling Act. As written, subsection (b)(3) provides for rebuttal of the interim presumption if "the evidence establishes that the total disability . . . of the miner did not arise in whole or in part out of coal mine employment." 20

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[1] 20 C.F.R. § 727.203(b) provides:

(b) Rebuttal of interim presumption. In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:

(1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or

(4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.

C.F.R. § 727.203(b)(3). Under the "in part" language contained in subsection (b)(3), the employer claims that compensation is permitted if only part of a miner's disability arose out of coal mine employment. Employer concludes that this result is inconsistent with the Act's provision that a coal miner will receive benefits when his pneumoconiosis is disabling in and of itself.

The employer's position is untenable. The regulation in question, when interpreted in accordance with its plain language, is clearly consistent with the Black Lung Act, its legislative history, and well-settled principles of workers' compensation law. Every United States Court of Appeals which has confronted the issue presented here has rejected the employer's position.

> "The premise underlying Bethlehem's view of its rebuttal is mistaken. Pneumoconiosis contracted during coal mine employer must be a causative factor in the miner's total disability, *but it need not be the exclusive factor rendering the claimant totally disabled in order to be compensable under the Black Lung Act.*

Bethlehem Mines Corp. v. Massey, 736 F.2d 120, 123 (4th Cir. 1984) (emphasis added); *Carozza v. U. S. Steel*, 727 F.2d 74 (3d Cir. 1984); *Alabama By-Products Corp. v. Killingsworth*, 733 F.2d 1511, 1516 n.10 (11th Cir. 1984).

The Secretary's intent to compensate totally disabled miners whose disability arose at least "in part" from their coal mine employment is unquestionable. In commenting on the rebuttal provision in question, the Secretary left no doubt as to the rationale behind the regulation's expansive language:

> "The Department rejects the view that the significant aggravation of a pre-existing condition by coal dust exposure should not be considered as a basis for eligibility under the Act. It is a commonly agreed upon and salutary principle of workers' compensation

> law that an employer takes an employee with whatever underlying conditions the employee has. Accordingly, aggravation of a pre-existing condition to the point of disability is considered a proper basis for awarding benefits under many compensation laws. Contrary to the commentator's argument, this is a well-established principle under the Longshoremen's and Harbor Workers' Compensation Act [CHWCA], which Act sets the pattern for the consideration of claims under Part C of the Black Lung Benefits Act. The 'aggravation' question has caused considerable confusion in the past and the Department hopes that the clarification in this Section will put the matter to rest."

43 Fed. Reg. 36,825 (August 18, 1978). The Secretary's position is further evidenced in the definition of pneumoconiosis set forth at 20 C.F.R. § 727.203. "Pneumoconiosis means a chronic dust disease of the lung *and its sequelae* . . . For purposes of this definition, a disease 'arising out of coal mine employment' includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment *significantly related to, or aggravated by,* dust exposure in coal mine employment. 20 C.F.R. § 727.202 (emphasis added).

The Secretary has been given considerable power under the Black Lung Act to formulate regulations controlling eligibility requirements. It is claimant's position that the power exercised by the Secretary in promulgating 20 C.F.R. § 727.203(b)(3) was well within the rulemaking authority delegated by Congress and served the broad remedial purposes of the Act.

Regulations, in order to be valid, must be consistent with the statute under which they are promulgated. *United States v. Larinoff*, 431 U.S. 865, 873 (1977). As long as a regulation is "reasonably related to the purposes of its enabling legislation," the validity of that regulation must be upheld. *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973), *quoting*

Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268, 280-81 (1969). One may find logical reasons for disagreeing with the apportioned proof burdens described in § 727.203(b)(3), but the litmus test of this regulation's validity is whether it complies with the provisions and purposes of the Black Lung Act. *Bethlehem Mines Corp. v. Massey, supra*, at 123. In the instant case, the regulation was promulgated by the Secretary, after notice and comment, pursuant to an express delegation of authority. 30 U.S.C. § 902(f)(1). The regulation is, therefore, entitled to the force and effect of law, and may not be overturned unless its promulgation is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Batterton v. Francis*, 472 U.S. 416, 425-426 (1977).

In enacting the Black Lung Benefits Reform Act of 1977, Congress directed the Secretary to promulgate regulations that "give the benefit of any doubt to the coal miner." Congress noted that many claims were being unjustly denied because "the state of the medical art is not sufficiently advanced to unequivocally identify occupationally related disability in coal mines. S. Rep. No. 95-209, 95th Cong., 1st Sess. 17, 21 (1977). The "in whole or in part" language of § 727.203(b)(3) "reflects the current uncertain state of medical knowledge concerning the exact consequences of prolonged exposure to coal dust." *Bethlehem Mines Corporation v. Massey, supra*, at 124. The Secretary's rebuttal regulation acknowledge this fact and, at the same time, serves to carry out the broad remedial purposes behind the Black Lung Act as articulated by Congress. The legislative purpose is clear: the effect of the recognized difficulty in medically determining the extent to which pneumoconiosis causes disability is to be placed on the employer by requiring it to show that pneumoconiosis was not even a partial cause of the miner's total disability.

The regulation's consistency with, and reasonable relationship to, the enabling Act is further evidenced in specific legislative history. This history indicates that Congress approved of compensation where pneumoconiosis is not the sole cause of a miner's total disability:

> "It is also intended that traditional workers' compensation principles such as those, for example, which permit a finding of eligibility where the totally disabling condition was significantly related to or aggravated by the occupational exposure be included in the regulations."

S. Rep. No. 95-209, 95th Cong., 1st Sess. 13-14 (1977). Under traditional workers' compensation law, compensation is proper where a work-related injury aggravates a pre-existing or non-work-related condition to the point of compensable disability, even if the work-related condition in and of itself is not compensable. This principle is well-stated in the expression that an employer takes his employee as he finds him. *Carozza v. U. S. Steel, supra*, at 78, n. 1. Larson, *The Law of Workmen's Compensation* §§ 12.20-12.21 (1982).

That Congress clearly intended for the Secretary to compensate miners whose disability arises from pneumoconiosis in combination with other impairments is demonstrated by judicial interpretations regarding an analogous statutory presumption. Section 411(c)(4) of the Act, 30 U.S.C. § 921(c)(4), provides that where an x-ray of a miner with 15 years of coal mine employment is negative for "complicated" pneumoconiosis, but other evidence establishes the existence of a total disabling respiratory impairment, there is a rebuttable presumption that the miner is totally disabled by pneumoconiosis. This presumption can be rebutted by establishing that the miner did not have pneumoconiosis or that "his respiratory or pulmonary impairment did not arise out of, *or in connection with*, employment in a coal mine"

(emphasis added). The Courts, in interpreting this provision, have held that the employer must demonstrate that the total disability was not caused *even in part* by coal mine employment to establish rebuttal. *Clinchfield Coal Company v. Fleming*, 606 F.2d 441 (4th Cir. 1979); *Rose v. Clinchfield Coal Company*, 614 F.2d 936 (4th Cir. 1980).

The employer's contention that the "whole or in part" language of the regulation improperly creates an almost impossible standard of rebuttal is unfounded. As previously indicated, legislative history reveals the remedial nature of the Black Lung Act. Moreover, Congress has expressed the view that claimants must not be unjustly denied benefits because of the medical uncertainty surrounding the nature of black lung disease. Thus, there is a clear indication that Congress approved of a scheme which places a substantial burden on the employer once the claimant has presented a *prima facie* case.

The reality of coal mine employment is such that many physical and environmental factors may converge to produce a totally disabling respiratory or pulmonary impairment. The Secretary's rebuttal regulation acknowledges this reality and, consistent with the letter and spirit of the Black Lung Act and traditional workers' compensation principles, places the burden on the employer to disprove the causal relationship between coal mine employment and total disability once the claimant establishes the existence of a qualifying medical condition. *Bethlehem Mines Corporation v. Massey*, *supra*, at 124. The Courts of Appeals that have confronted the regulation in question have uniformly found it to be reasonably related to the enabling Act. It is submitted that the "in whole or in part" language of § 727.203(b)(3) reflects the remedial nature and spirit of the Black Lung Act, and represents a proper exercise of the Secretary's rulemaking authority, and must therefore be upheld.

II. THE COURT OF APPEALS CORRECTLY RULED THAT THE EMPLOYER-PETITIONER FAILED TO REBUT THE PRESUMPTION OF CLAIMANT'S TOTAL DISABILITY DUE TO PNEUMOCONIOSIS. THE BENEFITS REVIEW BOARD, IN HOLDING TO THE CONTRARY, ERRONEOUSLY OVERSTEPPED ITS LIMITED SCOPE OF REVIEW.

The United States Court of Appeals for the Sixth Circuit correctly ruled that the Benefits Review Board erroneously reversed the decision of the administrative law judge who found claimant entitled to black lung disability benefits. The Board has a limited scope of review which is statutorily defined. If the administrative law judge's decision is supported by substantial evidence, is not irrational and is consistent with the applicable law, it is conclusive upon the Benefits Review Board and may not be disturbed. 30 U.S.C. § 932(a) incorporating 33 U.S.C. § 921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). In the instant case, the Board grounded its reversal on the ALJ's interpretation of the 20 C.F.R. § 727.203(b)(3) method of rebuttal (see Issue I). After finding the ALJ's interpretation of subsection (b)(3) to be improper, the Board then reweighed the evidence and found rebuttal to be established. As argued in the first issue of this brief, the Board erroneously invalidated the "in part" language found in 20 C.F.R. § 727.203(b)(3). The Board committed additional error, however, in reweighing the evidence for purposes of establishing rebuttal.

It is well settled that where findings of an administrative law judge, as the trier of fact, are supported by substantial evidence of record and discussed in a well reasoned opinion, the Board may not intervene to reweigh the evidence. All that is required is a rational correlation between the evidence presented and the decision reached by the administrative law judge. *Peabody Coal Co. v. Benefits Review Board*, 560 F.2d 797 (7th Cir. 1977). Where the administrative law judge weighed

all the relevant medical evidence of record and drew a reasonable conclusion based upon substantial evidence, the Board's scope of review does not extend to reweighing the evidence and drawing alternative conclusions. *Hamilton v. New River Coal Co.*, 4 BLR 1-190 (1981). The Board's independent evaluation of the evidence in this case, concerning the rebuttal issue, violated its limited scope of review.

The employer concedes that the administrative law judge properly invoked the interim presumption under 20 C.F.R. § 727.203(a)(1) based on positive x-ray evidence of pneumoconiosis. The employer, however, fails to acknowledge that the administrative law judge also found the presumption to be invoked under subsection (a)(2) (Petitioner's Appendix to writ of certiorari 34a). On the basis of pulmonary function studies performed by Dr. Del Vecchio, the administrative law judge concluded that the presumption of total disability due to pneumoconiosis must also be invoked pursuant to 20 C.F.R. § 727.203(a)(2).

For purposes of rebuttal, employer submitted the report and deposition of Dr. George Kress, M.D. Dr. Kress stated that claimant is totally disabled, but he attributed the disability to a cardiovascular impairment and not to claimant's pneumoconiosis. The administrative law judge, as trier of fact, evaluated all the relevant evidence and concluded that Dr. Kress' opinion was insufficient to establish rebuttal under § 727.203(b)(3).

In its decision below, the Court of Appeals found the administrative law judge's opinion to be supported by substantial evidence and to be free of factual and legal error:

> "The record before us reveals that the administrative law judge considered all of Saginaw's evidence. He expressly acknowledged Gibas' 'serious cardiovascular problems' and Dr. Kress' opinion that Gibas' disability was not caused by pneumoconiosis. Nonethe-

> less, the judge also found persuasive evidence that Gibas has pneumoconiosis, is disabled from shortness of breath and has been employed as a coal miner for twenty-four to twenty-nine years under dusty conditions (Petitioner's Appendix to writ of certiorari 15a-16a).

A review of the medical evidence and the administrative law judge's opinion supports the decision reached by the Court of Appeals.

Although Dr. Kress' opinion rejects claimant's pneumoconiosis as a contributing cause of his disability, the administrative law judge properly found Dr. Kress' opinion to be unpersuasive. First, Dr. Kress based his opinion, in part, on negative x-ray evidence. Positive x-ray evidence of pneumoconiosis exists in this claim, however. Moreover, negative x-rays do not constitute grounds upon which to deny a claim. *Ansel v. Weinberger*, 529 F.2d 304, 310 (6th 1976). Furthermore, ventilatory studies performed by Dr. Kress indicate, in the doctor's own words, a "moderately severe obstructive impairment." Add to these considerations the existence of Dr. Del Vecchio's diagnosis of pneumoconiosis, Dr. Del Vecchio's qualifying pulmonary function study values, claimant's extensive coal dust exposure and claimant's testimony, and it is clear that the administrative law judge properly found Dr. Kress' opinion insufficient to establish rebuttal of the interim presumption.

In reweighing the medical evidence, the Benefits Review Board transgressed its limited scope of review. The Court of Appeals correctly found the administrative law judge's opinion to be well reasoned and supported by substantial evidence. Accordingly, the Court of Appeals' decision should be affirmed.

III. THE COURT OF APPEALS, IN INTERPRETING 20 C.F.R. § 727.203(b), CORRECTLY FOUND THE BURDEN OF PERSUASION TO SHIFT TO THE EMPLOYER FOR PURPOSES OF ESTABLISHING REBUTTAL. THE REGULATION IN QUESTION IS CONSISTENT WITH THE EXPRESS AUTHORITY DELEGATED TO THE SECRETARY BY CONGRESS AND CLEARLY SERVES THE BROAD REMEDIAL PURPOSES OF THE BLACK LUNG ACT.

Once a claimant has met the medical criteria for invoking the interim presumption of total disability due to pneumoconiosis, the employer can rebut the presumption *if the evidence establishes* that the total disability of the miner did not arise in whole or in part out of coal mine employment. 20 C.F.R. § 727.203(b)(3) (emphasis added). In order to *establish* rebuttal, as stated by the Court of Appeals, the employer bears the burden of persuasion. Claimant contends that the shift of the burden of persuasion to the employer is indicated by the plain language of the regulation, the Congressional delegation of express authority to the Secretary to promulgate such regulations, and the remedial purposes of the Black Lung Act. The employer's contention that Rule 301 [2] of the Federal Rules of Evidence and the Court's decision in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), provide that only the burden of going forward with the evidence shifts to the employer on rebuttal (while the burden of persuasion or proof remains with the claimant) is without merit.

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[2] Rule 301 of the Federal Rules of Evidence provides:

Rule 301. Presumptions in General in Civil Actions and Proceedings. In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

Contrary to the employer's contention, Federal Rule of Evidence 301 does not control the operation of the presumption in the instant case. The Federal Rules of Evidence, by their own provisions, apply only to proceedings in federal courts and before U.S. Magistrates. Fed. F. Evid. 101, 1101. They are not intended to apply to administrative hearings such as those held under the Black Lung Benefits Act. *American Coal Co. v. Benefits Review Board*, 738 F.2d 387, 390 (10th Cir. 1984). Furthermore, the text of Rule 301 indicates, in no uncertain terms, that the Rule applies only to "civil actions and proceedings not otherwise provided by these rules . . ." In this case, Congress has clearly "otherwise provided."

The Black Lung Benefits Act, 30 U.S.C. § 932(a), specifically incorporates by reference § 23(a) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., § 923(a), which precludes mandatory application of "common law or statutory rules of evidence or . . . technical or formal rules of procedure" in adjudicating claims within the administrative process. Moreover, the inapplicability of Rule 301 is further evidenced by Congressional delegation of authority to the Secretary of Labor to promulgate regulations creating presumptions with limited rebuttal methods. *American Coal Co. v. Benefits Review Board, supra*, at 390. Limited rebuttal provisions are consistent with the broad remedial purpose of the Act and Congressional mandate that the Secretary's regulations *not be more restrictive* than the criteria applicable to claims filed on June 30, 1973. 30 U.S.C. § 902(f)(1) and (f)(2) (emphasis added).

In addition, claimant submits that the Court's holding in *Usery v. Turner Elkhorn Mining Co., supra*, does not require that the burden of persuasion remain with the claimant under § 727.203(b). In *Turner Elkhorn*, the Court stated that the presumptions under sections 411

(c)(1) and (2) of the Act, 30 U.S.C. § 921(c)(1) and (2), are "explicitly rebuttable, and the effect of each is simply to shift the burden of going forward with evidence from the claimant to the operator." *Usery v. Turner Elkhorn Mining Co.*, at 27. In distinguishing *Turner Elkhorn*, it is important to note that the Court's discussion centered on 30 U.S.C. §§ 921(c)(1) and (2). The presumptions involved in *Turner Elkhorn* are significantly different from the presumption at issue in this case. The presumptions set forth at Sections 921(c)(1) and (2) are merely described as "rebuttable"—the statute does not provide limited rebuttal provisions. In contrast, once the presumption is invoked the instant regulation, the rebutting party is limited to "establishing"[3] rebuttal by one of four *limited* methods. Thus, the presumption and *specific* rebuttal provisions under 20 C.F.R. § 727.203 materially differ from the bare presumption presented in *Turner Elkhorn*. In deciding the identical question presented here, the Court of Appeals for the Tenth Circuit concluded:

> "Finally, we note that the Supreme Court's reference to Rule 301 in *Usery v. Turner Elkhorn Mining Company* appears in a discussion expressly limited to consideration of 30 U.S.C. §§ 921(c)(1) and (2). Neither of these presumptions is at issue here, and neither limits the methods of rebuttal available to an employer.

American Coal Co. v. Benefits Review Board, at 390. By providing specific and very limited rebuttal provisions in

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[3] The burden of persuasion may be judicially or legislatively assigned to a particular party to establish a particular fact. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, N. 7 (1983). The regulations' specific requirement that the employer must "establish" rebuttal is evidence that the burden of persuasion shifts to the employer on rebuttal. The Court of Appeals for the Eleventh Circuit stated that "establish" is clearly synonymous with "prove", and that the burden of persuasion rests with the employer for purposes of rebuttal. *Alabama By-Products v. Killingsworth*, 733 F.2d 1511, 1514 (11th Cir. 1984).

§ 727.203(b), the Secretary has clearly demonstrated that the burden of persuasion is shifted to the employer. Because the Court's decision in *Turner Elkhorn* dealt with presumptions materially different than the presumption under § 727.203(b), that case is not controlling.

In light of the foregoing discussion, it is apparent that the Court of Appeals properly placed the burden of persuasion on the employer for purposes of establishing rebuttal. Once a claimant invokes the presumption of total disability due to pneumoconiosis, the burden of production and persuasion shifts to the employer. The Circuit Courts and the Benefits Review Board have so held and are in agreement. *McCluskey v. Zeigler Coal Co.*, 2 BLR 1-1248, 1272-73 (1981); *Hampton v. Benefits Review Board*, 678 F.2d 506, 508 (4th Cir. 1982); *Consolidation Coal Co. v. Smith*, 699 F.2d 446, 449 (8th Cir. 1983); *Alabama By-Products v. Killingsworth, supra; American Coal Co. v. Benefits Review Board, supra.* Federal Rule of Evidence 301, by its own terms and by provision of Congress, is not applicable. The operation of the evidentiary scheme delineated by 20 C.F.R. § 727.-203(a) and (b) is consistent with Congressional intent, the remedial nature of the Act, and the applicable decisions of the lower courts. It is also important to note that the Court's holding in *Usery v. Turner Elkhorn Mining* does not mandate a different result. Therefore, it is submitted that the issues raised herein are well settled and do not present questions of federal law which must be addressed by this Court as the employer contends. Accordingly, the decision of the Court of Appeals should be affirmed and employer's Petition for Writ of Certiorari denied.

CONCLUSION

For the foregoing reasons, Claimant-Respondent submits that the decision of the Court of Appeals be affirmed. The Petitioner's Writ of Certiorari does not present an issue which has not been convincingly and uniformly decided by the various Courts of Appeals which have confronted the issues presented in Petitioner's Writ. Therefore, Claimant-Respondent respectfully submits that the Writ of Certiorari be denied.

Respectfully submitted,

IRWIN W. BARKAN, ESQ.
DANIEL L. MANRING, ESQ.
(Counsel of Record)
BARKAN & NEFF CO., L.P.A.
50 W. Broad St., P.O. Box 1969
Columbus, Ohio, 43216
Telephone: (614) 221-4221
Counsel for Claimant-Respondent Lewis Gibas

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No. 84-1344

In the Supreme Court of the United States

OCTOBER TERM, 1984

SAGINAW MINING COMPANY, PETITIONER

v.

LEWIS GIBAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

FRANCIS X. LILLY
Solicitor of Labor

KAREN I. WARD
Associate Solicitor

ALLEN H. FELDMAN
Counsel for Appellate Litigation

SANDRA LORD
Attorney
Department of Labor
Washington, D.C. 20210

16pp

QUESTION PRESENTED

Whether the Secretary of Labor acted within his express statutory authority in promulgating regulations that defined the term "total disability" under the Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 748 F.2d 1112. The opinion of the Benefits Review Board (Pet. App. 19a-27a) is reported at 6 Black Lung Rep. 1-18. The decision of the administrative law judge (Pet. App. 31a-37a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 17a-18a) was entered on November 26, 1984. The petition for a writ of certiorari was filed on February 22, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Black Lung Benefits Act (Act), 30 U.S.C. 901 *et seq.*, provides benefits to "coal miners * * * who are totally disabled due to pneumoconiosis." 30 U.S.C. 901(a). The

Act expressly delegates to the Secretary of Labor, 30 U.S.C. 902(f)(1), authority to define the term "total disability." See *American Coal Co.* v. *Benefits Review Board*, 738 F.2d 387, 390 (10th Cir. 1984); *Carozza* v. *United States Steel Corp.*, 727 F.2d 74, 78 (3d Cir. 1984). Pursuant to the Act, the Secretary promulgated regulations that permit a miner with ten years of coal mine employment to invoke a presumption of total disability due to pneumoconiosis by meeting specified medical requirements. See 20 C.F.R. 727.203(a). The regulations provide for rebuttal of the presumption by relevant medical evidence establishing inter alia that the disability is not total or that coal mine employment played no role in causing the disability. See 20 C.F.R. 727.203(b).[1]

2. After 24 years of employment as a coal miner for petitioner Saginaw Mining Co., respondent Lewis Gibas quit in 1978 because of a serious heart condition. In May 1979 he applied for benefits under the Act (Director's Exh. 1). The Department of Labor determined him to be eligible and named petitioner as the operator responsible for paying his benefits. Following a hearing sought by petitioner, an administrative law judge (ALJ) concluded that Gibas had successfully invoked the presumption of total disability due to pneumoconiosis by introducing sufficient x-ray evidence of the disease. Pet. App. 33a-34a.[2]

Petitioner attempted to rebut that presumption. Under 20 C.F.R. 727.203(b)(3), petitioner was required to present "evidence establish[ing] that the total disability * * * of the

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[1]The regulations at issue in this case, 20 C.F.R. 727.200 *et seq.*, are interim criteria promulgated by the Secretary in accordance with the Act (Pub. L. 95-239, 92 Stat. 95 *et seq.*). Permanent criteria, applicable to claims filed after March 31, 1980, are contained in 20 C.F.R. Pt. 718. See 20 C.F.R. 718.1, 718.2.

[2]The question whether Gibas presented sufficient evidence to invoke the presumption is not before this Court. See Pet. 15.

miner did not arise in whole or in part out of coal mine employment." Petitioner submitted the deposition of a physician who opined that Gibas's disability was due to cardiovascular disease and not to pneumoconiosis (Pet. App. 3a, 35a). The ALJ rejected this medical opinion as "unduly speculative" (*id.* at 36a) and ruled that petitioner had not carried its burden of proving that Gibas's disability was in no part caused by pneumoconiosis. Relying on the length of Gibas's coal mine employment, on the x-ray showing simple pneumoconiosis, on evidence of disabling conditions including shortness of breath and on the report of a physician who testified that Gibas had lung disease, the ALJ concluded that Gibas was entitled to benefits (*ibid.*).

3. The Benefits Review Board (Board) reversed. Relying on its decision in *Jones* v. *The New River Co.*, 3 Black Lung Rep. 1-199 (Ben. Rev. Bd. June 10, 1981), the Board held that the rebuttal provision (20 C.F.R. 727.203(b)(3)) was inconsistent with the Act's requirement of total disability and, accordingly, that the words "in whole or in part" should be stricken from the regulation (Pet. App. 5a).[3] Under the provision as revised by the Board, a presumption of disability is rebutted if it is shown that the miner's pneumoconiosis was not in and of itself totally disabling. See *Bethlehem Mines Corp.* v. *Massey*, 736 F.2d 120, 122 (4th Cir. 1984); *Jones*, 3 Black Lung Rep. at 1-209. Applying that standard to the facts of this case, the Board concluded that the evidence that Gibas's disability was due to heart disease and not to pneumoconiosis sufficed to defeat his claim for benefits as a matter of law (Pet. App. 23a).

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[3]In light of the fact that all courts of appeals that have considered the question have rejected the Board's position, the Board recently granted reconsideration en banc in *Borgeson* v. *Kaiser Steel Corp.*, No. 81-1934 BLA (Ben. Rev. Bd. Feb. 25, 1985) to revisit its decision in *Jones*.

4. On appeal, the United States Court of Appeals for the Sixth Circuit rejected the Board's reasoning that the regulation improperly permitted the award of benefits for less than total disability. The court of appeals held that the regulation "has nothing to do with the degree of a miner's disability" (Pet. App. 14a) and that the "in whole or in part" language refers to causation, not to extent of disability (*id.* at 15a). Because 20 C.F.R. 727.203(b)(3) does not permit the award of benefits to miners who are less than totally disabled, the court of appeals concluded that the provision is consistent with the statutory goal of providing benefits to miners who are totally disabled due to pneumoconiosis arising out of coal mine employment (Pet. App. 15a).

Finally, the court of appeals reviewed the record and determined that there was substantial evidence to support the ALJ's conclusion that petitioner had failed to meet its burden of rebutting the presumption (Pet. App. 15a-16a).[4]

ARGUMENT

The judgment of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is unwarranted.

1. Petitioner's primary contention (Pet. 7-14) is that 20 C.F.R. 727.203(b)(3) is inconsistent with the Act because it permits the award of benefits to miners who are only partially disabled. All courts of appeals that have considered the question have correctly agreed, however, that the regulation does not have that meaning and is consistent with the Act. See *American Coal Co.*, 738 F.2d at 391; *Bethlehem Mines Corp.* v. *Massey*, 736 F.2d 120, 123 (4th Cir. 1984);

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[4]In addition, the Sixth Circuit rejected the Secretary's contention that the Board lacked authority to revise the regulation.

Alabama By-Products Corp. v. *Killingsworth*, 733 F.2d 1511, 1516 n.10 (11th Cir. 1984); *Carozza*, 727 F.2d at 78.[5]

As the court below recognized (Pet. App. 15a), the regulation does not permit benefits to be awarded for partial disability. Rather, it affords an employer the opportunity to prove that pneumoconiosis played no part in causing a miner's total disability. If the employer satisfies the evidentiary burden of 20 C.F.R. 727.203(b)(3), it may defeat a claim for benefits. Where, however, that showing is not made and pneumoconiosis is therefore a contributing cause of a miner's total disability, benefits will be awarded. Pet. App. 15a.

In effect, petitioner contends that a miner is entitled to benefits only when his total disability is caused *solely* by Black Lung disease (see Pet. 11, 12). But the statute requires only that the total disability be "due to pneumoconiosis."[6] 30 U.S.C. 901. The Secretary's interpretation that permits benefits to be awarded to a miner whose total disability is caused in some part by pneumoconiosis is consistent with the statute and reasonably related to its purpose, as the courts of appeals have unanimously ruled. *E.g.*, Pet. App. 15a; *Bethlehem Mines Corp.*, 736 F.2d at 124; *Carozza*, 727 F.2d at 78.[7]

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[5]The Board, moreover, seems disposed to reconsider its position that 20 C.F.R. 727.203(b)(3) conflicts with the Act. See note 3, *supra*.

[6]"Pneumoconiosis" is defined as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. 902(b), see 20 C.F.R. 727.202.

[7]"To uphold [the agency's interpretation] 'we need not find that [its] construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' We need only conclude that it is *a* reasonable interpretation of the relevant provisions." *American Paper Institute, Inc.* v. *American Electric Power Service Corp.*, 461 U.S. 402, 422-423

The Fourth Circuit stated in *Bethlehem Mines Corp.*, 736 F.2d at 124 that:

> The "in whole or in part" language of section 727.203(b)(3) simply reflects the current uncertain state of medical knowledge concerning the exact consequences of prolonged exposure to coal dust. * * * The reality of coal mine employment is such that many physical and environmental factors may converge to produce a totally disabling respiratory or pulmonary impairment. The Secretary's rebuttal regulation acknowledges this reality * * *. A less demanding standard would effectively remove a large class of miners from the remedial scope of the Black Lung Act — a result hardly compatible with the overarching purposes of the Act.

2. Petitioner argues further (Pet. 20-23) that the court of appeals erroneously shifted the burden of proof to the employer to show that Gibas's disability did not arise out of his coal mine employment. This contention is without merit. A party attempting to rebut a presumption based on a statute or a regulation may properly bear the burden of persuasion, see, *e.g.*, *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 403-404 n.7 (1983); *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 669 (1979); and the courts have uniformly held that 20 C.F.R. 727.203(b) in fact shifts the burden to the coal mine operator. See, *e.g.*, Pet. App. 16a; *American Coal Co.*, 738 F.2d at 390; *Bethlehem Mines Corp.*, 736 F.2d at 124; *Alabama By-Products Corp.*, 733 F.2d at 1514; *Consolidation Coal Co.* v. *Smith*, 699

(1983) (emphasis in original; citations omitted), quoting *Unemployment Compensation Comm'n* v. *Aragon*, 329 U.S. 143, 153 (1946). *Aluminum Co. of America* v. *Central Lincoln Peoples' Utility District*, No. 82-1071 (June 5, 1984), slip op. 9; see *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 371-372 (1973).

F.2d 446, 449 (8th Cir. 1983).[8] As the courts of appeals have noted, the decision relied upon by petitioner, *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), involved presumptions that differed significantly from 20 C.F.R. 727.203(b), in that they did not require the rebutting party to "establish" particular facts and thus to bear the burden of persuasion. See *Alabama By-Products Corp.*, 733 F.2d at 1515. Accord, *American Coal Co.*, 738 F.2d at 390.[9]

3. Finally, petitioner contends (Pet. 14-20) that it met its burden of rebuttal under 20 C.F.R. 727.203(b)(3) as a matter of law because it presented a medical opinion that Gibas's disability was in no part due to pneumoconiosis. Specifically, petitioner argues (Pet. 16) that the ALJ was required to give controlling weight to the medical opinion it submitted because Gibas introduced no contrary medical opinion.

The law is clear, however, as petitioner recognizes (Pet. 16), that the ALJ was not bound to credit the testimony of a single medical expert, even if that testimony was not directly refuted. See *Kaiser Steel Corp.* v. *Director, Office of Workers' Compensation Programs*, 748 F.2d 1426, 1430 (10th Cir. 1984); *Director, Office of Workers' Compensation Programs* v. *Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Todd Shipyards Corp.* v. *Donovan*, 300 F.2d 741, 742 (5th

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[8]Petitioner's reference (Pet. 18-19) to the "primary cause" requirement contained in 20 C.F.R. 410.426(a) is unavailing because that regulation has no application to the adjudication of Gibas's claim. Since the claim in this case was filed after the effective date of the regulations at 20 C.F.R. Pt. 727, Gibas may qualify for benefits under the presumption at 20 C.F.R. 727.203, which contains no primary cause requirement. See 20 C.F.R. 727.1-727.4; 20 C.F.R. 718.1(b).

[9]Petitioner's additional arguments based on Rule 301 of the Federal Rules of Evidence (Pet. 21-22), have been rejected by this Court. See *Transportation Management Corp.*, 462 U.S. at 403-404 n.7. Accord, *Alabama By-Products Corp.*, 733 F.2d at 1515; *American Coal Co.*, 738 F.2d at 390.

Cir. 1962). The trier of fact may weigh the medical evidence and draw his own inferences which, if based on substantial evidence, will be upheld on appeal. *Kaiser Steel Corp.*, 748 F.2d at 1430; *Todd Shipyards Corp.*, 300 F.2d at 742 ("[F]act finders are not bound to decide according to doctors' opinions if rational inferences lead in the other direction."). Cf. *NLRB* v. *Walton Mfg. Co.*, 369 U.S. 404, 408 (1962); *NLRB* v. *Cutting, Inc.*, 701 F.2d 659, 663 (7th Cir. 1983).[10]

Here, the ALJ considered and weighed all the evidence. See Pet. App. 33a-36a. In rejecting as "unduly speculative" the medical opinion that Gibas's disability was due to cardiovascular disease and not pneumoconiosis, the ALJ relied on record evidence concerning Gibas's 24 to 29 years of coal mine employment under dusty conditions, his x-ray showing simple pneumoconiosis, his disabilities (including shortness of breath), and the report of an examining physician who found evidence of lung disease. See Pet. App. 3a-4a. There was, accordingly, substantial evidence in the record supporting the ALJ's decision; but even if there was not, further review of this factbound issue would not be warranted. See *American Textile Mfrs. Institute, Inc.* v. *Donovan*, 452 U.S. 490, 523 (1981); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 477 (1951).

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[10]The cases cited by petitioner (Pet. 17-18) are not to the contrary. Those authorities require only that an ALJ's rejection of medical opinion must be based on a discernible rationale supported by substantial evidence. *E.g., Richardson* v. *Perales*, 402 U.S. 389 (1971); *Cotter* v. *Harris*, 642 F.2d 700, 706 (3d Cir. 1981); *King* v. *Califano*, 615 F.2d 1018, 1020 (4th Cir. 1980); *Peabody Coal Co.* v. *Director, Office of Workers' Compensation Programs*, 581 F.2d 121, 124 (7th Cir. 1978).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

FRANCIS X. LILLY
Solicitor of Labor

KAREN I. WARD
Associate Solicitor

ALLEN H. FELDMAN
Counsel for Appellate Litigation

SANDRA LORD
Attorney
Department of Labor

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